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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BANK OF COUSHATTA, *et al.*,
Petitioners,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A regional official of the Federal Deposit Insurance Corporation (the "FDIC") imposed an administrative sanction in the form of a capital directive on Bank of Coushatta (the "Bank") without the Bank's consent and without an opportunity for a hearing. Thereafter, a lawyer for the FDIC wrote a letter to a United States District Judge seeking judicial enforcement of the administrative sanction against not only the Bank but also its directors, who had not been named parties to the capital directive. For nearly two months the proceeding was pending before the judge without any notice to the Bank or its directors. The district court then entered its *ex parte* order enforcing the capital directive against both the Bank and the Bank's directors. The questions presented are:

1. Whether, under the Due Process clause of the Fifth Amendment to the U.S. Constitution and under the International Lending Supervision Act and the Administrative Procedure Act, an administrative sanction in the form of a capital directive may be issued without opportunity for a hearing.

2. Whether an Executive Branch agency may invoke the jurisdiction of an Article III court to enforce such an administrative sanction without subjecting the sanction to judicial review.

3. Whether an Executive Branch agency may obtain an *ex parte* Order enforcing an administrative sanction where there has been no opportunity for a hearing before the agency and no prior opportunity for judicial review.

4. Whether a capital directive may be enforced against bank directors who were not parties to the capital directive.

PARTIES TO THE PROCEEDING

Petitioners, defendants-appellants below, are Bank of Coushatta,* Henry W. Bethard, III, Ivy L. Dickson, Bobby R. Gahagan, Gerald Holland, Jackie D. Huckabay, and Harry B. Lawson. Respondent, plaintiff-appellee below, is the Federal Deposit Insurance Corporation.

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* Bank of Coushatta is a subsidiary of Coushatta Bancshares, Inc. Bank of Coushatta has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Bank of Coushatta (the "Bank"), Henry W. Bethard, III, Ivy L. Dickson, Bobby R. Gahagan, Gerald Holland, Jackie D. Huckabay, and Harry B. Lawson, Jr. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed a final order issued against them *ex parte*.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 930 F.2d 1122. The *ex parte* Order of the district court (App. 21a-22a) is unreported. The Memorandum Ruling of the district court denying the petitioners' motion for a stay pending appeal (App. 23a-29a) is also unreported. The respondent's capital directive (App. 30a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 20a) was entered on May 13, 1991, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution (Art. III, § 2, cl. 1 and Am. V) are reprinted at App. 34a. Pertinent provisions of the Administrative Procedure Act (5 U.S.C. §§ 701(a), 703, and 706) are reprinted at App. 34a-36a. Pertinent provisions of the Federal Deposit Insurance Act (12 U.S.C. § 1818(d), (h) and (i)(1)) are reprinted at App. 36a-38a. Pertinent provisions of the International Lending Supervision Act (12 U.S.C. § 3907(a)-(b)) and the FDIC's regulations thereunder (12 C.F.R. §§ 303.9(h) and 325.6) are reprinted at App. 38a-43a.

STATEMENT OF THE CASE

The International Lending Supervision Act of 1983 ("ILSA"), Pub. L. No. 98-181, § 908, 97 Stat. 1278, 1280 (1983) codified at 12 U.S.C. § 3907, authorized the FDIC to impose upon an undercapitalized "banking institution" a new type of sanction known as a "capital directive," which would require adherence to a plan for increased capitalization and would be enforceable in the same manner as a final cease-and-desist order. ILSA is silent with respect to both the procedures for issuance of capital directives and the availability of judicial review.

The FDIC adopted procedures for capital directives that did not incorporate the due process procedures of the Administrative Procedure Act ("APA") applicable to final cease-and-desist orders. Instead, the FDIC's regulations provided that the authority to initiate the procedure for issuing capital directives could be delegated to

FDIC regional directors. 12 C.F.R. §§ 303.9(h) and 325.6. The regulations also provided that regional directors could be delegated the authority to issue capital directives. *Id.* The regulations did not provide for any form of hearing or allow the banking institution or anyone else to present testimony, to confront and cross-examine the FDIC's witnesses, or to present oral argument. No intra-agency review of a regional director's decision to issue a capital directive was provided in the regulations. The FDIC's rulemaking did not provide a rationale for the failure to provide APA hearings in connection with the issuance of capital directives. *Capital Maintenance*, 49 Fed. Reg. 29,399 (1984); *Capital Maintenance*, 50 Fed. Reg. 11,128 (1985).

On July 28, 1989, FDIC's Memphis, Tennessee, regional director issued a "notice of intent" informing the Bank that he intended to issue a capital directive against it. The notice permitted the Bank to respond in writing within fourteen days. The Bank's then counsel responded in a brief letter. On September 28, 1989, the regional director issued a capital directive against the Bank (App. 30a). The Bank's directors were not parties to the capital directive.

On May 25, 1990, the FDIC's Memphis regional counsel wrote a letter to a United States District Judge of the Western District of Louisiana, seeking judicial enforcement of the capital directive against both the Bank and its directors. Attached to the letter was a petition asking the district court to enforce the capital directive. The letter invoked the district court's jurisdiction under 12 U.S.C. §§ 1818(i) and 3907. The FDIC's petition attached to the letter cited those sections as well as 12 U.S.C. § 1819 and 28 U.S.C. §§ 1331 and 1345. The petition was ultimately filed in the clerk's office on June 14, 1990. None of the petitioners herein, including the Bank, was served with process or otherwise given notice of the pendency of the district court proceedings.

On July 13, 1990, the district court entered its Order *ex parte* against all the petitioners (App. 21a). Upon learning of the district court's *ex parte* Order, the petitioners filed a timely notice of appeal and moved for a stay, first in the district court, which denied the motion on September 27, 1990 (App. 23a), and then in the court of appeals. In denying the stay, the district court raised the prospect that the Bank's officers, directors, and employees will be enjoined to infuse new capital into the Bank. App. 27a. The court of appeals also denied a stay, but accelerated the case for argument.

The petitioners' brief in the court of appeals asked the court to (i) vacate the *ex parte* Order of the district court and (ii) hold unlawful and set aside 12 C.F.R. §§ 303.9(h) and 325.6 as contrary to constitutional right. The petitioners also asked the court of appeals to hold unlawful and set aside the capital directive as agency action (i) contrary to constitutional right; (ii) taken without observance of procedure required by law; and (iii) unsupported by substantial evidence. Finally, the petitioners requested that any remand to the district court provide for a trial *de novo*.

The petitioners relied primarily upon this Court's decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), for the principle that a neutral decisionmaker was required under the Due Process clause and that the FDIC lacked authority to evade the requirements of the APA. For the latter point, the petitioners also relied upon this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

The petitioners argued that the FDIC's capital directive procedures were facially unconstitutional in that they did not provide a hearing with a neutral decisionmaker and the right to present evidence, confront and cross-examine the agency's witnesses, and present oral arguments. The petitioners further argued that under the

Administrative Procedure Act they were entitled to a hearing before an administrative law judge or, failing that, a trial *de novo* in district court. They also argued that no capital directive could legally issue unless supported by substantial evidence. Finally, they argued that the *ex parte* procedures in district court were contrary to *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406 (1960).

The FDIC's principal argument in response was that any deprivation of the petitioners' constitutional rights constituted harmless error. The FDIC also argued that the capital directive was nonreviewable under the withdrawal clause of 12 U.S.C. § 1818(i)(1),[1] which essentially provides that no court has jurisdiction to review a final cease-and-desist order except as provided in 12 U.S.C. § 1818(h). The petitioners countered that a capital directive was issued under 12 U.S.C. § 3907, not section 1818, and that subsection (i) of 12 U.S.C. § 1818 must be read in light of subsection (h), which refers to orders issued after an opportunity for a hearing. They further argued that any attempt to borrow the withdrawal clause of subsection (i) without the hearing procedures of subsection (h) rendered the withdrawal clause ineffective, allowing review in the judicial enforcement proceeding under 5 U.S.C. § 703.

The FDIC also argued that the capital directive was nonreviewable under 5 U.S.C. § 701(a)(2), asserting that the only thing even arguably reviewable was the "arithmetic" by which the capital level of the Bank was determined. The petitioners responded that factual disputes implicate judicial, not ministerial, functions and noted that although 12 U.S.C. § 1818(d) *mandates* that

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[1] "[E]xcept as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section or to review, modify, suspend, terminate, or set aside any such notice or order."

district courts enforce temporary cease-and-desist orders, 12 U.S.C. § 1818(i) merely *authorizes* district courts to enforce final cease-and-desist orders and capital directives. The petitioners also pointed out that the determination of a bank's capital level was not a matter of "arithmetic," but was instead a subjective determination by a bank examiner similar to that subject to formal hearings in cease-and-desist proceedings.

On May 13, 1991, the court of appeals affirmed the district court's *ex parte* Order (App. 1a, 20a). Without even discussing this Court's holdings in *Wong Yang Sung* or *Vermont Yankee Nuclear Power Corp.*, the court of appeals upheld the FDIC's capital directive procedures. Although acknowledging that there would have been an "obvious advantage" to the petitioners if there had been a neutral decisionmaker and the examination of witnesses, especially cross-examination, the court of appeals nevertheless held that the Due Process clause did not warrant a hearing prior to the issuance of a capital directive. App. 18a. Further, the court of appeals held that judicial review of capital directives is precluded pursuant to 5 U.S.C. § 701(a)(2) and that 5 U.S.C. § 701(a)(1) and 12 U.S.C. § 1818(i) precluded review of any kind in the district court. The court of appeals acknowledged that ILSA speaks only in terms of a "banking institution," but nevertheless upheld 12 C.F.R. § 325.6's claim of authority over individuals. The court of appeals did not reach the question whether the regional director's findings were supported by substantial evidence. This timely petition followed.

REASONS FOR GRANTING THE PETITION

1. This case presents questions of exceptional public importance regarding the availability of judicial review of administrative agency actions that bring the coercive powers of the government to bear upon individuals and their businesses. The court of appeals' decision in this case conflicts with numerous decisions of this Court and

in effect allows Executive Branch agencies to encroach upon the judicial powers of Article III courts, turning them into mere functionaries of the agencies, with the obligation to enforce agency actions, but without the ability to review those actions. Finally, this case presents issues of exceptional importance that were reserved by this Court or found not to be present in some of the most significant cases on the availability of judicial review under Article III of the U.S. Constitution and the Fifth Amendment's Due Process clause.

a. The FDIC's adoption of non-APA procedures was not authorized by either ILSA or the APA. In adopting the APA Congress explicitly "d[id] not limit or repeal additional requirements imposed by statute or *otherwise recognized by law.*" 5 U.S.C. § 559 (emphasis added). Moreover, in section 559, Congress indicated that no change in administrative procedures could occur except expressly. *Id.* Thus, the APA's goal of uniform procedures, which this Court recognized in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), was preserved by 5 U.S.C. § 559. The court of appeals' decision in the instant case refused to address statutory arguments concerning the FDIC's noncompliance with the APA under the mistaken belief that there was no law to apply except the U.S. Constitution.

b. The decision of the court of appeals conflicts with this Court's cases under 5 U.S.C. § 701(a)(1). "Because the standard for finding preclusion of review under § 701(a)(1) is a difficult hurdle to cross" (App. 11a), the court of appeals did not rest its own analysis upon 5 U.S.C. § 701(a)(1) and 12 U.S.C. § 1818(i). But the court of appeals did say that section 1818(i) permitted no review in the district court.[2] Section 1818(i) ("except as otherwise provided in this section no court shall

[2] This mistaken application of section 1818(i) was apparently the sole basis for the court of appeals' affirmance of the *ex parte* proceeding in district court.

have jurisdiction"), however, is not limited to district courts, but extends to all Article III courts. Thus, because the plain words of 12 U.S.C. § 1818(i) either did not preclude judicial review in the district court or prohibited review not only in the district court, but in all Article III courts, *any* reliance upon 12 U.S.C. § 1818(i) and 5 U.S.C. § 701(a)(1) raises the "serious constitutional question" not present in *Webster v. Doe*, 486 U.S. 592 (1988).

The court of appeals' holding with respect to reviewability in the district court was plain error. The Solicitor General's brief on behalf of the Board of Governors of the Federal Reserve System in *Board of Governors of the Federal Reserve System v. MCorp.*, Nos. 90-913 and 90-914 (hereinafter "*MCorp* Br."), concedes that section 1818(i) is not a jurisdictional bar, but only requires exhaustion of administrative remedies. *MCorp* Br. at 19-21, 32, 35. In the instant case, neither court below found any unexhausted administrative remedies. This is especially evident in the case of the individual petitioners, who are not parties to the capital directive.

c. The decision of the court of appeals conflicts with this Court's cases under 5 U.S.C. § 701(a)(2). Those cases do not preclude review where the Executive Branch itself invokes the jurisdiction of an Article III court. To the contrary, this Court's cases decided under section 701(a)(2) hold that review is available under those circumstances.

This Court's decisions applying section 701(a)(2) involve situations where an Executive Branch agency determined *not* to act (*e.g.*, *Heckler v. Chaney*, 470 U.S. 821 (1985)) or where the agency's action was self-effectuating and the agency was then named a defendant in a civil action to obtain judicial review (*e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988)). Thus, although separation-of-powers principles undergird this Court's jurisprudence under section 701(a)(2), those principles sup-

port reviewability where, as here, the Executive Branch agency itself invokes the powers of the Judicial Branch.

Put another way, the first paragraph of 5 U.S.C. § 701(a) is where Congress reserves its authority to protect against what it might consider to be undesirable judicial review, and the second paragraph is a similar grant of authority to the Judiciary. Thus, the courts apply "traditional" principles under section 701(a)(2). *E.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987).[3] Under this view, section 701(a)(2) is not necessarily or fully defined by reference to statutes. *Webster v. Doe*, 108 S. Ct. 2047, 2055 (1988) (O'Connor, J., concurring in part and dissenting in part).

The traditional jurisprudence developed under *Heckler v. Chaney*, 470 U.S. 821 (1985), includes

> principles ranging from the "political question" doctrine, to sovereign immunity . . ., to official immunity, to prudential limitations upon the courts' equitable powers, to what can be described no more precisely than *a traditional respect for the functions of other branches*. . . .

Webster v. Doe, 486 U.S. 592, 608-09 (1988) (Scalia, J., dissenting) (emphasis added). Indeed, the last sentence of Secretary Heckler's petition for certiorari stated, "This alteration of the separation of powers deserves review by this Court." *Heckler v. Chaney*, Pet. for Cert. 17. *Heckler v. Chaney*, the first case to apply section 701(a)(2) to preclude review,[4] did so because

> when an agency refuses to act it generally does not exercise its *coercive* power over an individual's lib-

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[3] *See generally* Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689 (1990).

[4] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), in which this Court first discussed 5 U.S.C. § 701(a)(2), involved a civil action against the Secretary of Transportation to challenge the Secretary's routing of a federal highway project. This Court held the Secretary's action reviewable.

> erty or property rights, and thus does not infringe upon areas that courts are often called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

Id. at 832 (emphasis in original). This is similar to the way Professor Hart put it nearly three decades ago in an article that has been cited frequently by this Court:

> Perhaps a plaintiff *does* have to take what Congress gives him or doesn't give him, although I have my doubts about it. But surely not a defendant. It's only a *limitation* on what a court can do once it has jurisdiction, not a denial of jurisdiction, that can hurt a defendant. And if the court thinks a limitation invalid, it's always in a position to say so, and either ignore it or let the defendant go free.

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953) (emphasis in original). *Compare* 12 U.S.C. § 1818(d), *mandating* the enforcement of lawful temporary cease-and-desist orders *with* 12 U.S.C. § 1818(i) *authorizing* the enforcement of final cease-and-desist orders. Analyzing the statute in Professor Hart's words, under 12 U.S.C. § 1818(i), the district court was "in a position to [hold the withdrawal provision invalid] and either ignore it or let the defendant[s] go free." Nothing in any of this Court's cases on 5 U.S.C. § 701(a) says otherwise.

Thus, as this Court has repeatedly stated, there is a strong presumption that Congress intends judicial review of administrative action. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672, n.3 (1986) (quoting *Barlow v. Collins*, 397 U.S. 159, 166-67 (1979)) (noting that "judicial review of . . . administrative action is the rule, and nonreviewability an exception which must be demonstrated"); *see also McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888, 898 (1991). Like *Overton*

Park, *Bowen* had involved a suit against an agency. *Bowen* served to emphasize the limits of *Heckler v. Chaney* and to emphasize the general presumption in favor of reviewability. Thus, *Overton Park*, *Heckler*, and *Bowen*, decided before *Webster*, and *McNary*, decided after *Webster*, all supported reviewability in the instant case, but the court of appeals nevertheless held that section § 701(a)(2) applied to preclude review. It did so contrary to those cases and contrary even to *Webster*, upon which the court of appeals placed primary reliance.

In *Webster*, the Executive Branch agency acted, but did not enlist an Article III court to enforce that action. Instead, the *Webster* case arose when the object of the agency's action sued to obtain judicial review. Thus, *Webster* did nothing to disturb the rule of reviewability announced in *Overton Park*, recognized in *Heckler*, and followed in *Bowen* and *McNary*. As Justice Scalia noted in his *Webster* dissent, section 701(a)(2) "operates to *keep* certain categories of agency action *out of* the courts; but when agency action *is appropriately in the courts, abuse of discretion is of course grounds for reversal.*" 486 U.S. at 610 (emphasis added). This is the way Congress understood reviewability when it enacted ILSA. The legislative history of ILSA includes the following statement made by the Chairman of the House Banking Committee: "The committee believes that the authority of an agency to require a bank to maintain adequate capital is properly within the expertise and discretion of the agency, *subject to the appropriate standard of judicial review.*" 129 Cong. Rec. H6411 (daily ed. Aug. 3, 1983) (statement of Rep. St. Germain) (emphasis added).

Webster, consistent with *Overton Park*, *Heckler*, *Bowen*, and the later decision in *McNary*, confines the executive and judicial branches to their appropriate constitutional roles. The proper purpose of section 701(a)(2) is to prevent certain executive decisions from being "hauled into the courts" (Scalia, J., dissenting at 486 U.S. 621), not

to turn Article III judges into ministerial subordinates of Executive Branch agencies.[5] Thus, in the instant case, when the FDIC invoked the "case or controversy" jurisdiction of an Article III court there was law to apply and the capital directive was then and there reviewable. Indeed, if there were no law to apply then Article III would on that basis preclude judicial enforcement of capital directives.

d. The decision of the court of appeals conflicts with this Court's cases decided under Article III of the U.S. Constitution and the Fifth Amendment's Due Process clauses. These cases, like *Heckler v. Chaney* and its progeny under 5 U.S.C. § 701(a)(2), consistently provide for review in judicial enforcement of agency actions. For example, in *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568 (1985), which describes the constitutional limits of nonreviewability, this Court noted:

> The danger of Congress or the Executive encroaching on the Article III judicial powers is at a minimum when *no unwilling defendant is subjected to judicial enforcement power as a result of agency "adjudication."* See, *e.g.*, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953), . . . L. Jaffe, Judicial Control of Administrative Action 385 (1965) (historically judicial review of agency decisionmaking has been required only when it results in the use of judicial process to enforce an obligation upon an unwilling defendant).

Id. at 591 (emphasis added). Similarly, *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), requires that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." *Id.* at

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[5] In the instant case, the district court viewed its function as purely ministerial. *See* App. 26a.

837-38 (emphasis in original).[6] *Mendoza-Lopez* resolved under the Due Process clause of the Fifth Amendment the issue found not to be presented under the Seventh Amendment in *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442, 455 n.13 (1977), where this Court said:

> We note that the decision of the administrative tribunal in these cases on the law is subject to review in the federal courts of appeals, and on the facts is subject to review under the substantial-evidence test. Thus, these cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceeding.[7]

Finally, in *Touby v. United States*, 111 S. Ct. 1752 (1991), under a separation-of-powers rationale, this Court held that an administrative agency action would be reviewable in a later judicial enforcement action.

2. The Court should grant the petition and summarily reverse the court of appeals' decision in this case because the *ex parte* procedures in the district court are contrary to this Court's cases.

a. The decision of the court of appeals affirming the *ex parte* Order in the instant case was in direct conflict with this Court's decision in *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). In *Armstrong*, this Court unanimously held that the failure to give a person notice of the pendency of a judicial proceeding violated the most rudimentary demands of due process of law. Similarly, in *Young v. United States ex rel Vuitton et fils S.A.*, 481

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[6] This Court also noted in *Mendoza-Lopez* that an adjudication by a biased judge rendered a trial fundamentally unfair. *Id.* at 837 n.17.

[7] This Court ultimately acknowledged a right to a trial by jury on the issue of liability for civil penalties. *Tull v. United States*, 481 U.S. 412 (1987).

U.S. 787, 800 n.10 (1987), this Court noted that a court's jurisdiction in a contempt proceeding is "only over those particular persons whose legal obligations result from their earlier participation in proceedings before the court." *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (in personam jurisdiction extends only to parties over whom the court has personal jurisdiction; injunctions bind nonparties only after proceedings in which concerted action or participation is shown and the person must be a party to that proceeding). The court of appeals' decision in the instant case specifically holds out the prospect of contempt sanctions. *See* App. 18a.

b. The court of appeals sanctioned procedures followed in the district court that so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Federal Rules of Civil Procedure govern the procedure in all suits of a civil nature, with certain very specific exceptions not applicable here. These rules contemplate filing a complaint with the clerk of the district court, and the service of process upon the defendants. Otherwise, the district court lacks subject matter jurisdiction. *See New Hampshire Fire Ins. Co. v. Scanlon*, 172 F. Supp. 392 (S.D.N.Y. 1959), *aff'd per curiam*, 267 F.2d 941 (2d Cir. 1959), *aff'd*, 362 U.S. 404 (1960). In the instant case, the petitioners learned they had been sued when the clerk of the court served the final order.

This error is also a proper basis for granting the writ and summarily reversing the decision of the court of appeals. Any judgment obtained without notice or service of process violates due process and, as this Court has held without dissent, must be reversed even if "in [the] particular case due process of law would have led to the same result because [the litigant] had no adequate defense upon the merits." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988) (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)).

c. The sole basis for the court of appeals' affirmance of the *ex parte* proceedings in the district court apparently was the holding that 12 U.S.C. § 1818(i) limited the district court's jurisdiction. In the *MCorp* case the Government has recently conceded that section 1818(i) merely restricts litigants to the avenues of judicial review otherwise available to them. *MCorp* Br. at 19-21, 32, 35. There are no such avenues available in this case, particularly with respect to the individual petitioners. Thus, on this basis alone the Court should grant the petition and summarily reverse the court of appeals' decision.

3. In *Board of Governors of the Federal Reserve System v. MCorp*, No. 90-913, this Court recently granted a writ of certiorari to consider the two statutes involved in the instant case. The withdrawal clause at issue in this case, 12 U.S.C. § 1818(i)(1), is the precise clause at issue in *MCorp*. ILSA is also one of the statutes upon which the Federal Reserve's source-of-strength doctrine at issue in *MCorp* is said to be based. Assuming *arguendo* that the decision of the court of appeals in the instant case was correct, affirmance of the decision would moot the source-of-strength issue in *MCorp* by providing a much more expeditious and reliable remedy to the banking agencies.[8]

Board of Governors of the Federal Reserve System v. MCorp involves both the question whether the federal regulatory agencies may use their cease-and-desist powers to require a bank's corporate shareholder to augment its subsidiary's capital and the question whether the courts have jurisdiction under 12 U.S.C. § 1818(i) to review the exercise of those powers. The capital directive authority as interpreted by the court of appeals in the

[8] This, of course, also bears witness to the fact that at the time of the events in *MCorp* the banking agencies did not believe that capital directive authority could be enforced against anything or anyone other than a "banking institution."

instant case (App. 8a-9a) would arguably apply to a bank holding company that participated in the affairs of its subsidiary banks. *But see MCorp Financial, Inc. v. Board of Governors of the Federal Reserve System*, 900 F.2d 852, 863 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (1991) (noting the Shadow Financial Regulatory Committee's view that capital directives cannot be issued to bank holding companies). The primary difference between the application of 12 U.S.C. § 1818(i) in the *MCorp* case and in the instant case is that in *MCorp* the jurisdiction of the court was invoked by the private party in a suit against the agency, but here the agency itself invoked the court's jurisdiction. *See MCorp* Br. at 12.

Of paramount importance to the Federal Reserve's reliance upon the withdrawal clause of 12 U.S.C. § 1818(i) in *MCorp* are the extensive due process protections in its procedures (*MCorp* Br. at 4, n.2) and the alternative means of judicial review of its orders (*MCorp* Br. at 19-21), both of which are lacking in this case. The Federal Reserve cites these protections not as makeweights, but as the very foundation of its arguments on 12 U.S.C. § 1818(i): "Under this straightforward statutory scheme, Congress has shielded the Board's *ongoing* enforcement actions from *premature* judicial *interference*." *MCorp* Br. at 20 (emphasis added).

4. Even assuming that the decision of the court of appeals was correct, it is in the interests of the FDIC, the Judicial Branch, and the public that a writ of certiorari be granted. So far as is known to the petitioners, the instant case involves the first capital directive issued by the FDIC. It is widely believed that the FDIC refrained from using its capital directive procedures because of doubts about their constitutionality. 56 Banking Report (BNA) 978 (1991). Indeed, given the ease with which it has been able to employ this form of administrative sanction in this case, one can imagine no other reason for

the FDIC's reluctance to use this tool or the other banking agencies' failure to use their capital directive authority against MCorp. Doubts as to the validity of the sanction remain, as emphasized by the *Carteret Saving Bank, FA v. Office of Thrift Supervision*, (D. N.J. Apr. 25, 1991) (U.S. Dist. LEXIS 5563), *appeal docketed*, No. 91-661 (3d Cir. 1991), in which the court issued a preliminary injunction enjoining a capital directive issued by the Office of Thrift Supervision under authority analogous to the FDIC's authority in this case.[9] It is in the interest of the respondent to resolve these doubts nationwide. It is also in the interests of the Judicial Branch that a writ of certiorari be granted, since assuming the court of appeals was correct, affirmance would eliminate the need for the expenditure of judicial resources in the review of capital directives and in the review of cease-and-desist orders involving capital (e.g. *MCorp*). Finally, it is in the interest of the public that a writ of certiorari be granted since, assuming the court of appeals was correct, the regulatory measure employed by the FDIC in this case could be adapted to a broad range of regulatory objectives, *e.g.*, environmental regu-

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[9] The petitioners concede that the sanction in the instant case was a capital directive within the meaning of ILSA, but it should be noted that the concept of a capital directive is so ill-defined that other agencies acting under analogous authority have labelled as "capital directives" what litigants or the courts reasonably believe are really regulations or cease-and-desist orders. *See Central Kentucky Production Credit Ass'n v. United States*, 846 F.2d 1460, 1461-62 (D.C. Cir. 1988) (litigants argued that the document was a regulation); *Carteret Savings Bank, FA v. Office of Thrift Supervision*, (D. N.J. Apr. 25, 1991) (U.S. Dist. LEXIS 5563), *appeal docketed*, No. 91-661 (3d Cir. 1991) (court found that "capital directive" contained a wide variety of requirements). Thus, although this case does not present the question whether an agency may oust the courts of jurisdiction merely by mislabelling an otherwise reviewable administrative agency action, the need for review of capital directives is amply demonstrated by the license being taken by those other agencies. More importantly, the decision of the court of appeals in the instant case conflicts with *Carteret*.

lation, transportation safety, occupational safety and health, food and drug regulation, nuclear safety, and insurance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4577

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee,

v.

BANK OF COUSHATTA, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

May 13, 1991

Before WISDOM, KING, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

The Federal Deposit Insurance Corporation issued a capital directive to the Bank of Coushatta and its directors (Board). After they failed to comply, the FDIC obtained an ex parte order from the district court to enforce the directive. The Bank and Board appeal from the order; they contend, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, and Fifth Amendment due process, that they were entitled to an

agency hearing and judicial review in conjunction with issuance of the directive. We AFFIRM.

I.

Chartered by Louisiana,[1] the Bank is federally insured, subject to the Federal Deposit Insurance Act, 12 U.S.C. § 1811, *et seq.*, and FDIC rules and regulations. In July, 1989, it was operating under the FDIC capital forbearance program in an attempt to bring its capital to a minimum level. Under its second capital forbearance plan, the Bank had agreed to bring its primary capital ratio to 5.49% by year end. The FDIC determined that the Bank could not comply with the plan, because its loss classifications exceeded amounts projected for all of 1989. As a result, in July 1989, the FDIC issued a notice of intent, with preliminary findings of fact and conclusions of law, stating that the Bank's primary capital was lower than required by regulation and that the FDIC proposed to issue a capital directive requiring the Bank by December 31, 1989, to increase that capital by not less than $725,000 and to achieve ratios of primary and total capital to total assets of not less than 5.5% and 6.0% respectively.

Accompanying the notice was a letter to the Board, which discussed the financial condition of the Bank, the reasons for its deteriorating status, and the intent of a capital directive action.[2] Also enclosed was the report on the examination of the Bank conducted as of April 1989 by the FDIC and a state examiner.

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[1] The Louisiana Office of Financial Institutions submitted an amicus brief in support of appellants.

[2] The Board was asked to both acknowledge receipt of the letter and "advise that the letter was made a part of the minutes of the Board." This, and similar facts, bear on its assertion that it is not a proper party to the district court enforcement proceeding from which this appeal lies. See note 5, *infra*.

Any response to the notice was due within 14 days after receipt and was to

> state any basis for relief from the proposed CAPITAL DIRECTIVE, and may seek modification of its terms, or seek other appropriate relief. Such response shall include any information, mitigating circumstances, documentation, or other relevant evidence which supports the Bank's position, and may include a plan for attaining the minimum capital requirement.

By only a 1½ page letter in August 1989, the Board responded; it noted its efforts to find additional capital, its lack of financial capacity, and the weakened nature of the Louisiana economy, stating that "[t]he main reason for failure to achieve the goals in the Capital Forbearance Plan is loan losses and the deterioration of the parcels held as Other Real Estate." The Board did not dispute any of the FDIC's classifications of assets or its calculations. Nor did it submit any proposal for meeting the FDIC requirements, stating only that "[t]he Board believes it will have sufficient earnings[s] to have a capital ratio in excess of 4% by year end, and will continue its efforts to find additional capital." The Board acknowledged the "capital deficiency" and requested modification of the capital forbearance plan in lieu of a capital directive.

The FDIC issued the directive in September 1989, with supporting findings of fact and conclusions of law and a cover letter to the Board. The Bank was directed (1) by December 31, 1989, to restore its ratio of primary capital to total assets to at least 5.5% and enhance that capital by at least $725,000; and (2) within 30 days, to submit a plan for achieving the capital level. The directive stated that it was binding upon "the Bank [and] its directors," among others.

Because the Bank failed to comply, the FDIC filed a letter in May 1990, in the United States District Court

in Louisiana, pursuant to 12 U.S.C. § 1818(i), requesting an order enforcing the directive against the Bank and Board. Attached to the letter was a Petition for Enforcement of Administrative Order, stamped filed on June 14, 1990. On July 13, 1990, the district court issued the requested ex parte order. The Bank, its officers and directors were ordered to comply with the directive and to submit a report within 30 days "setting forth in detail the manner and form in which Respondent has complied with the provisions of this Order. This Court shall retain jurisdiction . . . for the purpose of entertaining any petition which . . . [the FDIC] may make and entering further orders as may be necessary to enforce compliance with the terms of this Order." The Bank and Board filed an appeal from that order and a motion for stay pending appeal; the district court and this court denied the stay.

II.

The FDIC's authority to issue capital directives is one of its regulatory tools for dealing with troubled banks. Most of these methods are set forth in 12 U.S.C. § 1818; however, authority for a directive is found in the International Lending Supervision Act of 1983 (ILSA), 12 U.S.C. § 3907, which provides in part:

> (a)(1) Each appropriate Federal banking agency shall cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the appropriate Federal banking agency *deems* appropriate.
>
> (2) Each appropriate Federal banking agency shall have the authority to establish such minimum level of capital for a banking institution as the appropriate Federal banking agency, *in its discretion, deems* to be necessary or appropriate in light of the particular circumstances of the banking institution.

(Emphasis added.) Moreover, failure to maintain the requisite capital "may be *deemed* by the appropriate Federal banking agency, *in its discretion*, to constitute an unsafe and unsound practice. . . ." 12 U.S.C. § 3907 (b)(2) (emphasis added).

If a bank fails to maintain the required capital, the agency may issue a directive:

> (B)(i) Such directive may require the banking institution to submit and adhere to a plan acceptable to the appropriate Federal banking agency describing the means and timing by which the banking institution shall achieve its required capital level.
>
> (ii) Any such directive issued pursuant to this paragraph . . . shall be enforceable under the provisions of Section 1818(i) . . . to the same extent as an effective and outstanding order issued pursuant to Section 1818(b) . . . which has become final.

12 U.S.C. §§ 3907(b)(2)(B)(i) and (ii).

The above referenced § 1818(b) governs cease-and-desist proceedings. Cease-and-desist orders are issued only after an agency hearing, §§ 1818(b)(1) and (h)(1), and "become effective at the expiration of thirty days after the service of such order . . . and shall remain effective and enforceable . . . , except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court." 12 U.S.C. § 1818 (b)(2). Such orders may be reviewed in a court of appeals within thirty days after service of the order. § 1818(h)(2).

And, § 1818(i), also referenced above in § 3907, provides:

> The appropriate Federal banking agency may in its discretion apply to the United States district court . . . for the enforcement of any effective and out-

> standing notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

Accordingly, a capital directive may be enforced in the district court under § 1818(i). But, as also referenced above, the district court's jurisdiction is limited. "[S]ection 1818(i) . . . evinces a clear intention that [the] regulatory process is not to be disturbed by untimely judicial intervention, at least where there is no 'clear departure from statutory authority.'" *Groos Nat'l Bank v. Comptroller of Currency*, 573 F.2d 889, 895 (5th Cir.1978) (citation omitted). Furthermore, the hearing requirements for cease-and-desist orders are not incorporated in the procedures for capital directives.

Section 3907 was enacted to provide "a stronger, unambiguous statutory directive to the regulators to strengthen banks' capital positions." H.R.Rep. No. 98-175, 98th Cong., 1st Sess. 45, reprinted in 1983 U.S. Code Cong. & Admin.News 1768, 1928.

> The [Senate Banking and Finance] Committee's amendment explicitly makes failure to maintain established capital levels an "unsafe and unsound practice. . . ." The amendment requires regulators to demand that institutions below the required capital levels submit and adhere to an acceptable plan to achieve prescribed levels.

Id. at 1929.

Another congressional purpose behind § 3907 was in response to this court's decision in *First Nat'l Bank of Bellaire v. Comptroller of Currency*, 697 F.2d 674 (5th Cir.1983), where the portion of a cease-and-desist order

requiring a capital ratio was set aside as not being supported by substantial evidence. *Id.* at 684-87. Congress was concerned that *Bellaire* "clouded the authority of the bank regulatory agencies to exercise their *independent discretion* in establishing and requiring the maintenance of appropriate levels of capital." S.Rep. No. 98-122, 98th Cong., 1st Sess. 16 (emphasis added).

> The Committee believes that establishing adequate levels of capital is properly left to the *expertise* and *discretion* of the agencies. Therefore, in order to clarify the authority of the banking agencies to establish adequate levels of capital requirements, to require the maintenance of those levels, and *to prevent the courts from disturbing such capital*, the Committee has provided a specific grant of authority to the banking agencies to establish levels of capital . . . .

Id. (emphasis added).

The capital maintenance regulations define such terms as primary capital, secondary capital, total assets, assets classified loss and intangible assets. 12 C.F.R. § 325.2 (1990 ed.). They describe how the ratios are calculated, with the minimum capital requirement for "a bank" being ratios of total and primary capital to total assets of not less than the aforementioned 6% and 5.5% respectively. § 325.3.[3]

A bank's financial condition is determined through an examination process. Examiners appointed by the FDIC have authority to examine "any insured State nonmember bank . . . whenever the [FDIC] determines an examination . . . is necessary." 12 U.S.C. § 1820(b)(2). After

---

[3] The Bank is classified as a "bank" under the regulations. "The term 'bank' means an FDIC insured, state-chartered commercial or savings bank that is not a member of the Federal Reserve System." § 325.2(2)(b). A "bank" is distinct from an "insured bank" under the regulations.

a "thorough examination," the examiner is required to "make a full and detailed report of condition" to the FDIC. 12 U.S.C. § 1820(b)(5).

The examination may lead to a capital directive being issued. But, the regulations require the FDIC to first issue a notice of its intention to issue the directive; and the notice must include detailed data, such as the current total capital ratio and the basis upon which the ratio is calculated. 12 C.F.R. § 325.6(c)(1). The bank has 14 days to respond, including explaining why the directive should not issue and seeking modification of its terms.[4]

After the bank responds, the FDIC issues a decision, explaining its determination whether to issue a directive. The directive may order the bank to achieve the minimum capital requirement by a certain date; to submit a plan for achieving the minimum capital requirement; or to take other action necessary to achieve the minimum capital requirement; or a combination of the above. § 325(c)(3). If a directive is to be issued, it may be served upon the bank with the final determination. *Id.*

The regulations then allow enforcement, as described above, in the same manner as for a final cease-and-desist order. Moreover, "[i]n addition to enforcement of the directive, the FDIC may seek . . . penalties for violation of the directive against any bank, any officer, *director*, employee, agent, or other person participating in the conduct of the affairs of the bank, pursuant to 12 U.S.C. § 3909(d)." § 325.6(d)(1) (emphasis added).[5]

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[4] As the Bank was advised, the response "shall include any information, mitigating circumstances, documentation or other relevant evidence which supports its position, and may include a plan for attaining the minimum capital requirement." § 325.6(c)(2).

[5] Section 3907 only speaks to issuing a directive to "a banking institution." 12 U.S.C. § 3907(b)(2)(A). However, enforcement of the directive against only the "bank" would be meaningless. For example, a "bank" can not raise capital and otherwise seek to ensure that a capital directive is complied with; that is accomplished

A.

In response to the contention that the district court ex parte proceedings deprived the Bank and Board of a right to judicial review under the APA, the FDIC asserts that the decision to issue a capital directive is not reviewable, because it is committed to agency discretion by law. Likewise, in denying a stay pending appeal, the district court held that "whether . . . to issue a capital directive is committed to the sole discretion of the FDIC and is, therefore, unreviewable under the [APA]. 5 U.S.C. § 701(a)(2)."

There is a presumption of reviewability. "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1987); *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671, 106 S.Ct. 2133, 2136, 90 L.Ed.2d 623 (1986) (" 'Very rarely do statutes withhold judicial review.' ") (quoting legislative history of APA).

The APA's provisions for judicial review of final agency actions are contained in 5 U.S.C. §§ 701-706. Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

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by its board and officers, among others. Accordingly, the district court's order was directed to the Bank and Board. They assert that there was no "indication that the individual defendants [the Board] would be named as parties in any litigation," because the Board members "were not parties to the capital directive." The Board was clearly on notice of the directive. Two cover letters, discussed *supra*, were addressed to it; and the response to the notice of intent was through the Board's counsel. Furthermore, the subsequently issued directive states, pursuant to the regulation described above, that it is "binding upon the Bank, its directors, officers, employees, agents, successors, assigns, and other persons participating in the affairs of the Bank."

> action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 702, however, is limited by § 701(a). "[B]efore any review . . . may be had, a party must first clear the hurdle of § 701(a)." *Heckler v. Chaney*, 470 U.S. 821, 828, 105 S.Ct. 1649, 1654, 84 L.Ed.2d 714 (1985). That section provides for judicial review, "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The distinction between subparts (1) and (2) in § 701(a) is that,

> [t]he former applies when Congress has expressed an intent to preclude judicial review. The latter applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely.

Heckler, 470 U.S. at 830, 105 S.Ct. at 1655.

In looking first to determine whether review is precluded under § 701(a)(1), we note that there is no statutory prohibition against it; but neither is there any procedure for it—unlike final cease-and-desist orders. Furthermore, no review is allowed in the district court enforcement proceeding; as discussed above, its jurisdiction is limited to the "power to order and require compliance." § 1818(i)(1).

As noted, § 3907 was enacted in part, in response to judicial interference with capital requirements, as in *Bellaire*. Examination of the statutory scheme and its legislative history supports a congressional intention to preclude review. However, in the absence of an express prohibition, there is a "strong presumption that Congress

did not mean to prohibit all judicial review of [the] decision." *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* (quoting *Abbott Labs*, 387 U.S. at 141, 87 S.Ct. at 1511). Because the standard for finding preclusion of review under § 701(a)(1) is a difficult hurdle to cross, we turn instead to the applicability, *vel non*, of § 701(a)(2) (agency action committed to its discretion).

In *Heckler*, the Supreme Court engaged in its first concentrated interpretation of § 701(a)(2) and noted that its construction was complicated by the "tension between a literal reading of § (a)(2), which exempts from judicial review those decisions committed to agency 'discretion,' and the primary scope of review prescribed by § 706(2)(A)—whether the agency's action was 'arbitary, capricious, or an *abuse of discretion.*'" 470 U.S. at 829, 105 S.Ct. at 1654 (emphasis in original). Initially, the Court discussed *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), where, in addressing whether an agency decision was subject to judicial review, it stated that the § 701(a)(2) exception was very narrow, to be applied only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410, 91 S.Ct. at 820 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). *Heckler* adopted the *Overton Park* reasoning and found it was not at odds with abuse of discretion review under § 706:

> [R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute . . . can be taken to have "committed" the decisionmaking to the

> agency's judgment absolutely. This construction avoids conflict with the "abuse of discretion" standard of review in § 706—if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."

470 U.S. at 830, 105 S.Ct. at 1655. The reasoning in *Heckler* is helpful for our analysis; but, *Heckler* involved a refusal to take enforcement action. The Court held that such refusal was "generally committed to an agency's absolute discretion," because it "involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831, 105 S.Ct. at 1655. The Court further noted that "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* at 832, 105 S.Ct. at 1656 (emphasis in original).

In *Webster* v. *Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L. Ed. 2d 632 (1988), the Court addressed § 701(a)(2) in the context of an agency's decision to act, thereby expanding its *Heckler* analysis. In *Webster*, a discharged CIA employee contended that his termination violated the APA because it was, among other things, in violation of the procedures required by law and the CIA regulations.[6] The statute in issue allowed termination of a CIA employee whenever the director "shall *deem* such termination necessary or advisable in the interests of the United States." *Id.* at 600, 108 S.Ct. at 2052 (quoting § 102(c) of the National Security Act, 50 U.S.C. § 403(c)) (emphasis in original). The Court first emphasized that

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[6] Several constitutional violations were also alleged, including Fifth Amendment procedural due process, as discussed *infra* in Part II.B.

§ 701(a)(2) "requires careful examination of the statute on which the claim of agency illegality is based," *id.*, and held:

> This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review. Short of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to those interests, we see no basis on which a reviewing court could properly assess an Agency termination decision. The language of § 102(c) thus strongly suggests that its implementation was "committed to agency discretion by law."
>
> So too does the overall structure of the National Security Act.

Id. In ruling, the Court relied on the legislative history of the National Security Act, which evidenced the Act's "extraordinary deference" to the CIA director and his decisions to terminate individual employees. *Id.* at 601, 108 S.Ct. at 2052.

The FDIC contends that the legislative history and language of ILSA demonstrate that Congress likewise intended capital directives to be unreviewable. Relying on *Webster*, it asserts that the repeated use of the word "deem" in the statute evidences deference and forecloses review. Section 3907 uses the terms "deem" or "discretion" in almost every provision: the FDIC may cause institutions to maintain adequate levels of capital by such methods as it "deems appropriate," § 3907(a)(1); it can establish minimum levels of capital which it "in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution," § 3907(a)(2); the failure of a banking institution to maintain its capital "may be deemed by the appropriate Federal banking agency, in its discretion, to constitute an

unsafe and unsound practice," § 3907(b)(1).[7] And, the legislative history, discussed *supra*, also supports such a construction. For example: "The Committee believes that establishing adequate levels of capital is properly left to the *expertise* and *discretion* of the agencies . . . and to prevent the courts from disturbing such capital, the Committee has provided a specific grant of authority to the banking agencies to establish levels of capital. . . ." S.Rep. No. 98-122 at 16 (emphasis added).

The legislative history and language of the statute do not leave a court with a meaningful standard against which to judge the agency's exercise of its discretion. Accordingly, we conclude that even if review is not prohibited pursuant to § 702(a)(1), it is precluded pursuant to § 702(a)(2), because issuance of a directive is committed to the FDIC's discretion.

B.

It is contended that the procedures for issuance of a capital directive violate Fifth Amendment due process and can be saved only by incorporation of APA hearing provisions. As discussed in *Webster*, even if agency action is committed to its discretion by law, judicial review of constitutional claims is still available, unless congressional intent to preclude such review is clear. 108 S.Ct. at 2053. We do not find such intent. Moreover, the FDIC concedes that unreviewability does not extend to the issue of whether there is a "constitutional right to a full hearing on the record prior to issuance of a directive," and instead asserts that the procedures provide due process.

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[7] As discussed *infra*, issuance of a capital directive is one of the least intrusive methods available to the FDIC when dealing with a troubled bank. Its purpose is for prompt action, in order for banks to come into compliance before more drastic feasures are required, such as issuance of a cease-and-desist order of termination of a bank's insured status. *See* 12 U.S.C. § 1818(a)-(e). These more drastic means provide for an APA hearing and judicial review.

The Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L.Ed.2d 18 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). It "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334, 96 S.Ct. at 903 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)). "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Likewise, what due process may require "in dealing with one set of interests . . . may not be required in dealing with another set of interests." *Arnett v. Kennedy*, 416 U.S. 134, 155, 94 S.Ct. 1633, 1645, 40 L.Ed.2d 15 (1974). Accordingly, *Matthews* adopted a three factor test:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. at 903.

1.

For purposes of applying this test, we must review, once again, the earlier described procedures. If the FDIC makes an initial determination that a directive should issue, it notifies the bank of its intent to do so and provides detailed underlying data. The July 1989 letter accompanying the notice enclosed a copy of the April 1989 examination prepared by an FDIC examiner in conjunction with a state examiner. The letter noted that the condition of the Bank remained "severely distressed with the examination reflecting a further decline in capital" and discussed other problems that the examiners had discovered. A copy of the proposed capital directive was enclosed.

The letter advised, as provided in the regulations, that the Bank could file a written response within 14 days including providing supporting data, explaining why the directive should not issue or seeking a modification of its terms or other relief. Failure to file a written response constitutes waiver of the opportunity to do so and is consent for the directive's issuance. § 325.6(c)(6).

The regulations required the FDIC to consider the Bank's response and "serve upon the [Bank] a written determination addressing the [Bank's] response and setting forth the FDIC's findings and conclusions in support of any decision to issue or not to issue a directive. The directive may be issued as originally proposed or in modified form." 12 C.F.R. § 325.6(c)(3). The regulations further provide that upon a change in circumstances, a bank may request reconsideration of the directive's terms and "may propose changes in the plan under which it is operating to meet the minimum capital requirement." § 325.6(c)(4).

The decision to issue a capital directive is made only after an evaluation of a bank's capital structure, the regulations providing that

> [t]he FDIC is required to evaluate capital before approving various applications by banks. The FDIC also must evaluate capital, as an essential component, in determining the safety and soundness of banks it insures and supervises.

12 C.F.R. § 325.1. The decision comes only after, among other things, an extensive examination by a trained bank examiner. As discussed, a bank is given a copy of the examination report with the notice of intent. In response, it may submit any evidence which supports its position. The response postpones issuance. And, the FDIC considers the response in making its determination.

The Bank does not contend that the FDIC did not follow its procedures. Instead, it asserts that it is not allowed to dispute the underlying facts which make up the FDIC's determination that the Bank is not in compliance. However, the notice of intent states that the Bank could include "other relative evidence" which supported its position. The Bank could have responded to the notice with documentation that the FDIC's data was either in error or had changed. There is no limit on what a bank can say in its response. The Bank did not take full advantage of its opportunity to respond. Nor did it challenge any of the data provided it, including the report of examination. Needless to say, its failure to take such opportunity is not due to an inherent deficiency in the procedures.

Although the FDIC procedures do not involve a hearing, with testimony and examination before a neutral officer, they do allow notice and ample opportunity to respond before a directive issues. The directive issued in September 1989; enforcement was not sought until May 1990. Furthermore, under the regulations, once a directive has issued, a bank may request the FDIC to reconsider its terms and propose changes to any plan under which it is operating.

2.

We analyze the three *Matthews* factors against this procedural backdrop. First, the private interest affected is obviously substantial. For example, the directive requires a capital infusion of $725,000; and the regulations allow contempt sanctions for noncompliance.

Turning to the second factor, we find that the risk of an erroneous deprivation of the Bank's interests through the procedures described above is minimal. It had an opportunity to respond to the notice of intent, including to the examination report. The need for additional procedural safeguards is speculative. The Bank has not shown that evidence it could present at a hearing could not have been presented in response to the notice. While there is obvious advantage to the presence, and participation, of a neutral decisionmaker and examination of witnesses, especially cross-examination, it is not significant enough here to warrant a hearing prior to issuance of a directive. The decision to issue comes only after several deliberative steps and thorough documentation, including a bank examination, presentation of the examination report to a bank and consideration of any written response.

Third, the government's interest in having capital directives promptly implemented is significant. The benefits from a directive would be weakened greatly, if not lost, if additional procedures, including a hearing, were necessary. For example, if a hearing were required, the directive would be delayed; by the time the matter was resolved, a bank's financially troubled status, requiring issuance of a directive, may have deteriorated substantially.

The relationship of a capital directive to other regulatory tools the FDIC can employ in dealing with a troubled bank is relevant to this analysis. Other actions, such as a cease-and-desist order and termination of a bank's insured status, are much more intrusive. For example,

a cease-and-desist order gives the FDIC authority "to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party." 12 U.S.C. § 1818(b)(7). The institution may be required to restrict its growth; dispose of any loan or asset involved; rescind agreements or contracts; employ qualified officers or employees; or "take such other action as the banking agency determines to be appropriate." 12 U.S.C. § 1818(b)(6)(B)-(F). These actions provide for an APA evidentiary hearing and judicial review.

Therefore, we conclude that the capital directive procedures satisfy Fifth Amendment due process.[8]

III.

Accordingly, the order of the district court is

AFFIRMED.

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[8] Because we find that the FDIC's actions are committed to agency discretion by law, we need not address the Bank's contention that the agency findings are not supported by substantial evidence; it claims that because there was no hearing, then, *ipso facto*, there can be no substantial evidence.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4577

Misc. Docket No. 90 37

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee,

versus

BANK OF COUSHATTA, HENRY W. BETHARD, III, IVY L. DICKSON, BOBBY R. GAHAGAN, GERALD HOLLAND, JACKIE D. HUCKABAY and HARRY B. LAWSON, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

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Before WISDOM, KING and BARKSDALE, Circuit Judges.

JUDGMENT

[Filed May 13, 1991]

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the cost on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Jun. 4, 1991 May 13, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil No. Misc. 90 37

Chief Judge Tom Stagg

FEDERAL DEPOSIT INSURANCE CORPORATION
550 17th Street, N.W.
Washington, D.C. 20429,

Plaintiff

v.

BANK OF COUSHATTA, Coushatta, Louisiana, HENRY W. BETHARD, III, IVY L. DICKSON, BOBBY R. GAHAGAN, GERALD HOLLAND, JACKIE D. HUCKABAY, and HARRY B. LAWSON, JR.,

Defendants

ORDER

[Filed Jul. 13, 1990]

The Court, having considered the Federal Deposit Insurance Corporation's "Application for Summary Enforcement of Order of Federal Deposit Corporation", supporting memorandum, the Affidavit of Regional Director Bill C. Houston, and the Affidavit of Examiner John W. Robertson, Jr., enters the following ORDER:

1. The Application of Plaintiff for the issuance of an Order pursuant to 12 U.S.C. § 1818(i)(1), to enforce the terms and provisions of the Federal Deposit Insurance Corporation's Capital Directive is GRANTED.

2. Defendant, Bank of Coushatta, its officers, directors, agents, employees, and other institution-affiliated parties of the Bank are hereby ORDERED forthwith to comply with all terms and provisions of the September 22, 1989 Capital Directive.

3. Defendant, Bank of Coushatta, its officers, directors, agents, employees, and other institution-affiliated parties of the Bank are hereby ENJOINED to undertake the following action:

(a) The Defendants shall augment and enhance its primary capital by not less than $725,000.

(b) The Defendants shall restore and thereafter maintain a ratio of primary capital to total assets of not less than 5.5 percent.

4. Defendants shall file with the Court and serve on Plaintiff Federal Deposit Insurance Corporation within thirty (30) days after the date of entry of this Order, a report in writing and under oath, setting forth in detail the manner and form in which Respondent has complied with the provisions of this Order. This Court shall retain jurisdiction of this matter for the purpose of entertaining any petition which Plaintiff Federal Deposit Insurance Corporation may make and entering further orders as may be necessary to enforce compliance with the terms of this Order.

Nothing in this Order shall affect the ability of the Federal Deposit Insurance Corporation to take any other action against defendants if it deems it appropriate in carrying out its official duties and responsibilities.

The Clerk shall cause the defendants to be serviced by the U.S. Marshal with a copy of the Application for Summary Enforcement of Order of FDIC, Memorandum of Points and Authorities in Support of Application for Summary Enforcement of Order of FDIC, and this Order.

/s/ Tom Stagg
United States District Judge

July 13, 1990

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Miscellaneous No. 90-37

CHIEF JUDGE TOM STAGG

FDIC CORPORATION

versus

BANK OF COUSHATTA, *et al.*

MEMORANDUM RULING

[Filed Sep. 28, 1990]

Presently before the court is the defendants' motion for stay of this court's July 13, 1990, order pending the outcome of their appeal to the United States Court of Appeals for the Fifth Circuit. For the reasons set out below, the defendants' motion for a stay is hereby DENIED.

I. *Procedural History:* On July 28, 1989, the Federal Deposit Insurance Corporation ("FDIC"), issued a Notice of Intent to Issue Directive to the Bank. The Notice stated that the FDIC had determined that the Bank of Coushatta (the "Bank") was engaging in an unsafe or unsound banking practice by virtue of the fact that as of April 28, 1989, the Bank had a ratio of total capital to total assets of 3.76%, and a ratio of primary capital to total assets of 3.76%. The FDIC stated that these percentages showed that the Bank was operating with inadequate capital to support the quantity and quality of the

assets in its portfolio. The Bank responded to the Notice on August 14, 1989. In its response, the Bank stated that it

> regrets that it has not been able to achieve its goals in accordance with its Capital Forbearance Plan, but as [the FDIC is] aware, the economy of the State of Louisiana and the northwest portion of the State in particular has been devastated and seems to be continuing to slide. The main reason for failure to achieve the goals in the Capital Forbearance Plan is loan losses and the deterioration of the parcels held as Other Real Estate. The people in the area are having very tough times, and there is little or no market for the real estate the bank holds.

After considering the Bank's response to its Notice, the FDIC determined that the Bank had failed to maintain adequate capital and determined to proceed with issuance of the capital directive pursuant to 12 U.S.C. § 3907 and 12 C.F.R. § 325.6. The capital directive required the Bank to complete the required capital augmentation and achieve the minimum capital ratio specified therein by December 31, 1989. The Bank has yet to comply with the directive.

On June 14, 1990, the FDIC petitioned this court for enforcement for the capital directive pursuant to 12 U.S.C. § 1818(i). The FDIC stated that under 12 U.S.C. § 1818(i)(1), the only issue before this court was whether the capital directive was "effective and outstanding." Based upon this petition, the court issued an *ex parte* ruling on July 13, 1990, enforcing the FDIC's capital directive. Pursuant to the order, the Bank of Coushatta was enjoined to augment and enhance its primary capital by not less than $725,000 as required by the capital directive and restore and thereafter maintain a ratio of primary capital total assets of not less than 5.5% as required by the capital directive. The Bank was given thirty days within which to comply with the court's rul-

ing. Thereafter, this court extended the deadline for compliance for October 5, 1990.

II. *Motion for Stay:* Fed. R. App. P. 8(a) provides that an "[a]pplication for a stay of judgment or order of a district court pending appeal . . . or for an order suspending, modifying, restoring or granting an injunction during the pendency of appeal must ordinarily be made in first instance in the district court." Under Rule 8 and precedent, this court is required to consider four factors to determine whether movant has made a sufficient showing for this court to grant a stay of the injunction pending appeal. These factors are:

1. Movant's likelihood of success on the merits;
2. Irreparable harm to the movant if the stay is not granted;
3. Substantial harm to the nonmovant if the stay is granted; and
4. The effect of granting the stay on public interest.

Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981), *cert. denied*, 460 U.S. 1042 (1983). The Fifth Circuit has held that "on motions for stay pending appeal[,] the movant need not always show a 'probability' of success on the merit; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Id.*; *Providence Journal v. Federal Bureau of Investigations*, 595 F.2d 889 (1st Cir. 1979). Nevertheless, the court went on to state that "if the balance of equities (i.e. consideration of the other three factors) is not heavily tilted in the movant's favor the movant must then make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal." *Id.* at 565-66.

(a) *Likelihood of Success on the Merits:* The defendants advance four arguments for reversal of this court's

order. First, the defendants argue that the *ex parte* order would not have been granted but for the misrepresentations in the FDIC's letter to this court. The misrepresentations about which the defendants are referring are those implying that this court had merely a ministerial role to play in enforcing the FDIC's capital directive. After examining the statutory scheme under which the FDIC is granted authority to issue and seek enforcement of capital directives, this court finds no merits in defendants' arguments.

Second, the defendants argue that the granting of the order *ex parte* deprived the defendants of their rights under the Administrative Procedures Act to judicial review of the capital directive. The court finds, however, that the determination of whether or not to issue a capital directive is committed to the sole discretion of the FDIC and is, therefore, unreviewable under the Administrative Procedures Act. 5 U.S.C. § 701(a)(2). The language throughout 12 U.S.C. § 3907 clearly establishes that Congress intended that issuance of capital directives would be within the sole and unreviewable discretion of the FDIC. Furthermore, 12 U.S.C. 1818(i) provides that:

> no court shall have jurisdiction to effect by injunction or otherwise the issuance or enforcement of any notice or order under this section, *or to review, modify, suspend, terminate, or set aside any such notice or order.*

Thus, the defendants' second argument must fail.

Third, the defendants argue that the capital directive procedure of the FDIC is contrary to the Administrative Procedures Act. As demonstrated above, the capital directive procedure fit within the exceptions to the rigors of the Administrative Procedures Act found in 5 U.S.C. § 701(a)(2).

Defendants' final argument is that the capital directive procedures of the FDIC in this case were contrary to the

constitutional rights of the defendants under the Due Process Clause of the Fifth Amendment to the United States Constitution. Defendants rely primarily upon the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). Wong Yang Sung was a native and citizen of China. Immigration officials arrested him on the charge of being unlawfully in the United States through having overstayed shore leave as one of a shipping crew. A hearing was held before an Immigration Inspector who recommended deportation. The Acting Commissioner approved this recommendation and the Board of Immigration Appeals affirmed. Wong Yang Sung sought relief from custody by *habeas corpus* proceedings upon the sole ground that the administrative hearing was not conducted in conformity with the Administrative Procedures Act. The Supreme Court first found that the Administrative Procedures Act applied to the Immigration deportation hearing. 339 U.S. at 49. The Court went on to state that if the Administrative Procedure Act did not apply to such deportation hearings, the constitutionality of such hearings would be called into question. *Id.*

The case at bar is clearly distinguishable from that in *Wong Yang Sung*. First, this court is dealing with an institution which exists under regulation of the federal government. The Bank depends upon federal funds, for the most part for its very existence. Furthermore, the property interest involved in this case is much less compelling than that involved in *Wong Yang Sung*. "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." *Wong Yang Sung*, 339 U.S. at 50.

In this case, the only property interest which this court can see jeopardized by these proceedings is that the officers, directors and employees of the Bank will be enjoined to infuse new capital into the Bank and bring it up to standards of safe and sound banking practices. The test

for determining the "specific dictates of due process" was established by the Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976). This test requires consideration of three factors:

1. The nature of the private interest affected by the agency action;
2. Potential risk of an erroneous deprivation; and
3. The government's interest in limiting the affected party to current procedures.

424 U.S. at 336, 341, 343, 347. While this court believes that the private interests affected in this case are substantial, the risk of erroneous deprivation is nonexistent. The Bank admitted in its letter that it would not meet regulatory standards. Furthermore, decisions to issue capital directives are made from information contained in the bank's own documents. Such data will not be made more reliable by oral presentation. When defendants were given the opportunity to contest the FDIC's underlying data, they acquiesced. Thus, unlike *Wong Yang Sung*, the defendants have not convinced the court that they were not afforded the process due them under the constitution.

(b) *Other Factors:* Even were this court to find that the defendants had presented a substantial case on the merits, the court would have to deny the stay based upon a finding that the other relevant factors substantially weigh against granting the stay. In the present banking situation in the southwest, this court cannot aid a bank in maintaining unsafe and unsound banking practices. Congress is battling a major deficit which had been added to recently by numerous bank failures in Louisiana. Obviously, Congress is attempting to guard against future losses by detecting probable failing institutions at an early stage at which they can be more easily remedied.

In addition, the defendants have not shown the court that they will be irreparably harmed by denial of a stay. The defendants merely state that because they have al-

leged a constitutional violation, irreparable harm is shown *per se*. The cases cited by the defendants do not stand for this proposition and, therefore, the movants have not met their burden of persuasion.

The defendants' motion for stay pending appeal is, therefore, DENIED. In order to allow the defendants adequate time to petition the Fifth Circuit for a stay pending appeal, the compliance date for this court's July 13, 1990, order is extended to Monday, October 15, 1990.

An order consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED, in chambers, at Shreveport, Louisiana, on this the 27th day of September, 1990.

/s/ Tom Stagg
TOM STAGG
Chief Judge

APPENDIX E

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

CAPITAL DIRECTIVE ISSUED
PURSUANT TO 12 U.S.C. § 3907

FDIC-89-158d

IN THE MATTER OF
BANK OF COUSHATTA, COUSHATTA, LOUISIANA

(Insured State Nonmember Bank)

The Federal Deposit Insurance Corporation ("FDIC") has determined that Bank of Coushatta, Coushatta, Louisiana ("Bank"), is engaging in an unsafe or unsound banking practice as defined at section 325.4 of the FDIC Rules and Regulations, 12 C.F.R. § 325.4, by virtue of the fact that as of April 28, 1989, the Bank has a ratio of total capital to total assets, as those terms are defined in section 325.2 of the FDIC Rules and Regulations, 12 C.F.R. § 325.2 of 3.76 percent, and a ratio of primary capital to total assets, as those terms are defined in section 325.2 of the FDIC Rules and Regulations, 12 C.F.R. § 325.2, of 3.76 percent. The FDIC hereby issues this CAPITAL DIRECTIVE pursuant to the provisions of section 908 of the International Lending Supervision Act of 1983, 12 U.S.C. § 3907, and section 325.6 of the FDIC Rules and Regulations, 12 C.F.R. § 325.6.

Upon a review of the Bank's response to FDIC's NOTICE OF INTENT TO ISSUE DIRECTIVE TO RESTORE AND MAINTAIN CAPITAL and PRELIMINARY FINDINGS OF FACT AND CONCLUSIONS OF

LAW and PROPOSAL TO ISSUE CAPITAL DIRECTIVE ("NOTICE OF INTENT TO ISSUE DIRECTIVE"), the FDIC finds and concludes as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Bank is a corporation existing and doing business under the laws of the State of Louisiana, having its principal place of business in Coushatta, Louisiana. The Bank is and has been, at all times pertinent to this action, an insured State nonmember bank, subject to the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. §§ 1811-1831d, amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, —— (1989) (to be codified at 12 U.S.C. § 1811 *et seq.*) the Rules and Regulations of the FDIC, 12 C.F.R. Chapter III, the International Lending Supervision Act of 1983, 12 U.S.C. §§ 3901-3912, and the laws of the State of Louisiana.

2. As of April 28, 1989:

(a) The Bank's total assets, as defined in section 325.2(k) of the FDIC Rules and Regulations, 12 C.F.R. § 325.2(k), equal $39,413,000.

(b) The Bank's total capital, as defined in section 325.2(l) of the FDIC Rules and Regulations, 12 C.F.R. § 325.2(l), equals $1,482,000, or 3.76 percent of total assets.

(c) The Bank's primary capital, as defined in section 325.2(h) of the FDIC Rules and Regulations, 12 C.F.R. § 325.2(h), equals $1,482,000, or 3.76 percent of total assets.

(d) The Bank's total deposits equal $37,209,000.

3. The Bank is engaging in an unsafe or unsound banking practice within the meaning of section 325.4(b) of the FDIC Rules and Regulations, 12 C.F.R. § 325.4(b),

in that the Bank is operating with inadequate capital to support the quantity and quality of the assets in its portfolio, as demonstrated by the following data as of April 28, 1989:

(a) The Bank holds adversely classified assets in the amount of $4,036,000, including $482,000 in assets classified "Loss," $164,000 in assets classified "Doubtful," and $3,390,000 in assets classified as "Substandard."

(b) Total classified assets represent 205.50 percent of the Bank's total capital and reserves of $1,964,000.

(c) Nonaccrual loans totaled $749,000, and represent 4.5 percent of the Bank's total loans.

(d) The Bank's allowance for loan and lease losses is inadequate to protect its depositors and other creditors:

(i) The Bank's allowance for loan and lease losses was $429,000; and

(ii) The Bank's adversely classified loans of $3,126,000 represent 728.67 percent of its allowance for loan and lease losses.

4. Upon consideration of the facts recited in the paragraphs above, the FDIC has determined that the Bank has failed to maintain adequate capital, as required by section 908 of the International Lending Supervision Act of 1983, 12 U.S.C. § 3907, and sections 325.3 and 325.4 of the FDIC Rules and Regulations, 12 C.F.R. §§ 325.3 and 325.4.

CAPITAL DIRECTIVE

After taking into consideration the FINDINGS OF FACT AND CONCLUSIONS OF LAW stated herein and contained in preliminary form in the NOTICE OF INTENT TO ISSUE DIRECTIVE and the written response of the Bank to the NOTICE OF INTENT TO ISSUE DIRECTIVE, it is hereby:

DIRECTED, that the Bank restore and thereafter maintain its ratio of primary capital to total assets at not less than 5.5 percent.

FURTHER DIRECTED, that the Bank shall enhance and augment its primary capital by not less than $725,000.

FURTHER DIRECTED, that the Bank shall complete the required capital augmentation and achieve the minimum ratio directed above by December 31, 1989.

FURTHER DIRECTED, that within 30 days of the receipt of this CAPITAL DIRECTIVE, the Bank shall submit a plan acceptable to the FDIC describing the means and timing by which the Bank shall achieve the required capital level.

FURTHER DIRECTED, that this CAPITAL DIRECTIVE shall become effective upon the date of its receipt by the Bank.

Each provision of this CAPITAL DIRECTIVE shall be binding upon the Bank, its directors, officers, employees, agents, successors, assigns, and other persons participating in the affairs of the Bank.

Each provision of this CAPITAL DIRECTIVE shall remain effective and enforceable except to the extent that, and until such time as, any provision shall be modified, terminated, suspended, or set aside by the FDIC.

Pursuant to delegated authority.

Dated at Memphis, Tennessee this 22nd day of September 1989.

/s/ Bill C. Houston
BILL C. HOUSTON
Regional Director
Memphis Regional Office
Federal Deposit Insurance
Corporation

(SEAL)

APPENDIX F

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. art. III, § 2, cl. 1 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. V provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

5 U.S.C. § 701(a) provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 703 provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by the statute or, in the absence or inadequacy thereof, any applicable

form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

12 U.S.C. § 1818(d)[1] provides:

> In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

12 U.S.C. § 1818(h) provides:

> (1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal

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[1] The Title 12 United States Code provisions are as amended by the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, Stat. 183 and the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h) of this section. Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or any order issued under paragraph (1) of subsection (g) of this section) by filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as

provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

12 U.S.C. § 1818(i)(1) provides:

The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 3907 (a)-(b) provides:

(a)(1) Each appropriate Federal banking agency shall cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the appropriate Federal banking agency deems appropriate.

(2) Each appropriate Federal banking agency shall have the authority to establish such minimum

level of capital for a banking institution as the appropriate Federal banking agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution.

(b) (1) Failure of a banking institution to maintain capital at or above its minimum level as established pursuant to subsection (a) of this section may be deemed by the appropriate Federal banking agency, in its discretion, to constitute an unsafe and unsound practice within the meaning of section 1818 of this title.

(2) (A) In addition to, or in lieu of, any other action authorized by law, including paragraph (1), the appropriate Federal banking agency may issue a directive to a banking institution that fails to maintain captial [sic] at or above its required level as established pursuant to subsection (a) of this section.

(B) (i) Such directive may require the banking institution to submit and adhere to a plan acceptable to the appropriate Federal banking agency describing the means and timing by which the banking institution shall achieve its required capital level.

(ii) Any such directive issued pursuant to this paragraph, including plans submitted pursuant thereto, shall be enforceable under the provisions of section 1818(i) of this title to the same extent as an effective and outstanding order issued pursuant to section 1818(b) of this title which has become final.

12 C.F.R. § 303.9(h) provides:

Capital directives. (1) Authority is delegated to the Director, and where confirmed in writing by the Director, to an associate director, or to the appropriate regional director or deputy regional director, to issue:

(i) Notices of intent to issue directives; and

(ii) Directives to insured state nonmember banks that fail to maintain capital in accordance with the requirements contained in part 325 of this chapter (12 CFR part 325).

(2) The authority delegated under paragraph (h)(1) of this section shall be exercised only upon the concurrent certification by the Deputy General Counsel for Supervision and Legislation, or the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director or deputy regional director issues the notice of intent to issue a capital directive or directives, by the appropriate regional counsel, that the action taken is not inconsistent with the Act and part 325.

12 C.F.R. § 325.6 [2] provides:

(a) *General.* A directive is a final order issued to a bank that fails to maintain capital at or above the minimum capital requirement as set forth in §§ 325.3 and 325.4. A directive issued pursuant to this section, including a plan submitted under a directive, is enforceable in the same manner and to the same extent as a final cease-and-desist order issued under 12 U.S.C. 1818(b).

(b) *Issuance of directives.* If a bank is operating with less than the minimum capital requirement established by this regulation, the Board of Directors, or its designee(s), may issue and serve upon any insured state nonmember bank a directive requiring the bank to restore its capital to the minimum capital requirement within a specified time period. The directive may require the bank to submit to the appropriate FDIC regional director, or other specified official, for review and approval, a plan describing

[2] Prior to amendment effective on April 10, 1991.

the means and timing by which the bank shall achieve the minimum capital requirement. After the FDIC has approved the plan, the bank may be required under the terms of the directive to adhere to the plan. The directive may be issued during the course of an examination of the bank, if the bank is found to be operating with less than the minimum capital requirement.

(c) *Notice and opportunity to respond to issuance of a directive.* (1) If the FDIC makes an initial determination that a directive should be issued to a bank pursuant to paragraph (b), the FDIC through the appropriate designated official(s) shall serve written notification upon the bank of its intent to issue a directive. The notice shall include the current total capital ratio, the basis upon which said ratio was calculated, the proposed capital injection, the proposed date for achieving the minimum capital requirement and any other relevant information concerning the decision to issue a directive. When deemed appropriate, specific requirements of a proposed plan for meeting the minimum capital requirement may be included in the notice.

(2) Within 14 days of receipt of notification, the bank may file with the appropriate designated FDIC official(s) a written response, explaining why the directive should not be issued, seeking modification of its terms, or other appropriate relief. The bank's response shall include any information, mitigating circumstances, documentation or other relevant evidence which supports its position, and may include a plan for attaining the minimum capital requirement.

(3) After considering the bank's response, the appropriate designated FDIC official(s) shall serve upon the bank a written determination addressing the bank's response and setting forth the FDIC's findings and conclusions in support of any decision

to issue or not to issue a directive. The directive may be issued as originally proposed or in modified form. The directive may order the bank to (i) achieve the minimum capital requirement established by this regulation by a certain date; (ii) submit for approval and adhere to a plan for achieving the minimum capital requirement; (iii) take other action as is necessary to achieve the minimum capital requirement; or (iv) a combination of the above actions. If a directive is to be issued, it may be served upon the bank along with the final determination.

(4) Any bank upon a change in circumstances, may request the FDIC to reconsider the terms of a directive and may propose changes in the plan under which it is operating to meet the minimum capital requirement. The directive and plan continue in effect while such request is pending before the FDIC.

(5) All papers filed with the FDIC must be postmarked or received by the appropriate designated FDIC official(s) within the prescribed time limit for filing.

(6) Failure by the bank to file a written response to notification of intent to issue a directive within the specified time period shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of such directive.

(d) *Enforcement of a directive.* (1) Whenever a bank fails to follow the directive or to submit or adhere to its capital adequacy plan, the FDIC may seek enforcement of the directive in the appropriate United States district court, pursuant to 12 U.S.C. 3907(b)(2)(B)(ii), in the same manner and to the same extent as if the directive were a final cease-and-desist order. In addition to enforcement of the directive, the FDIC may seek assessment of civil money penalties for violation of the directive against

any bank, any officer, director, employee, agent or other person participating in the conduct of the affairs of the bank, pursuant to 12 U.S.C. 3909(d).

(2) The directive may be issued separately, in conjunction with, or in addition to, any other enforcement mechanisms available to the FDIC, including cease-and-desist orders, orders of correction, the approval or denial of applications, or any other actions authorized by law.

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No. 91-24

In the Supreme Court of the United States

OCTOBER TERM, 1991

BANK OF COUSHATTA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a capital directive issued by the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. 3907 is subject to judicial review under the Administrative Procedure Act in district court enforcement proceedings.

2. Whether the procedures for issuance and enforcement of a capital directive are constitutional.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 930 F.2d 1122. The district court's order (Pet. App. 21a-22a) and its memorandum ruling denying petitioners' motion for a stay pending appeal (Pet. App. 23a-29a) are unreported. The capital directive issued by the Federal Deposit Insurance Corporation (Pet. App. 30a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1991. The petition for a writ of certiorari was filed on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the Bank of Coushatta, a bank chartered by the State of Louisiana and federally insured pursuant to the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, and its directors (collectively the Bank). On July 28, 1989, the Federal Deposit Insurance Corporation (FDIC) sent a letter to petitioners transmitting the FDIC's most recent report of examination of the Bank's financial condition. The letter noted that the Bank was operating with capital below the minimum required regulatory level. The letter further noted that the Bank's deteriorating financial status suggested that the Bank was incapable of meeting the commitment it had previously made to regulators to increase its capital. Pet. App. 2a.

Accompanying the letter was the FDIC's proposal to issue a capital directive—specifically, a Notice of Intent to Issue Directive to the Bank to increase its capital pursuant to Section 3907(b)(2) of the International Lending Supervision Act of 1983 (ILSA), 12 U.S.C. 3907(b)(2), and 12 C.F.R. 325.6.[1] The

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[1] Capital directives are authorized by ILSA, which requires federal banking agencies to "cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the appropriate Federal banking agency deems appropriate." 12 U.S.C. 3907(a)(1). The ILSA further permits a federal banking agency, "in its discretion," to consider the failure of a bank to maintain capital at or above the minimum level "to constitute an unsafe and unsound practice within the meaning of [12 U.S.C. 1818]." 12 U.S.C. 3907(b)(1). In addition to that remedy, a banking agency "may issue" a capital directive—"a directive to a banking institution that fails to maintain capital at or above its required level as established pursuant to subsection (a) of this

Notice contained preliminary findings of fact and conclusions of law stating that the ratio of the Bank's primary and total capital to assets, as defined by applicable regulations, was below minimum regulatory requirements. The Notice proposed a capital directive requiring that, by December 1989, the Bank increase its ratio of primary capital to total assets and its ratio of total capital to assets to that required for a healthy bank, and also requiring an increase in capital of not less than $725,000. Pet. App. 2a.

Under 12 C.F.R. 325.6(c), the Bank had the right to respond to the proposed capital directive, "explaining why the directive should not be issued, seeking modification of its terms, or other appropriate relief." In August 1989, the Bank responded to the Notice with a brief letter. The Bank did not dispute any aspect of the FDIC's calculation of the Bank's capital position, instead admitting that it was not in compliance with regulatory capital requirements. Pet. App. 3a, 24a, 28a. The letter explained that the Bank's tenuous financial position was the result of loan losses, other real estate losses, and the weakness of the Louisiana economy. The letter offered no concrete proposal for meeting the minimum capital requirements. *Id.* at 3a.

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section." 12 U.S.C. 3907(b)(2)(A). The "directive may require the banking institution to submit and adhere to a plan acceptable to the * * * agency describing the means and timing by which the banking institution shall achieve its required capital level." 12 U.S.C. 3907(b)(2)(B). 12 C.F.R. 325.6 sets forth the FDIC's procedures for the issuance of a capital directive. In keeping with the nature of a capital directive as one of the less intrusive enforcement mechanisms, Pet. App. 18a-19a, ILSA does not specify formal administrative proceedings for the issuance of a capital directive, nor does it provide for judicial review of such a directive. 12 U.S.C. 3907. See Pet. App. 4a-7a, 16a-17a.

In September 1989, after considering petitioners' response, the FDIC issued the capital directive. Pet. App. 30a-33a. The directive was binding on both the Bank of Coushatta and its directors. Pet. App. 33a; see 12 U.S.C. 3909(d); 12 C.F.R. 325.6(d)(1). It required the Bank to meet the minimum ratio of primary capital to total assets and to increase its capital by $725,000. Petitioners were given thirty days in which to submit a plan for meeting the required capital level. Pet. App. 33a.

2. Petitioners failed to comply with the capital directive. In May 1990, the FDIC applied to the United States District Court for the Western District of Louisiana for an order enforcing the capital directive pursuant to 12 U.S.C. 1818(i).[2] On July 13, 1990, the district court issued the requested order ex parte, enjoining petitioners to comply with the capital directive and requiring them to file a report within thirty days after entry of the order detailing their compliance with the order. Pet. App. 3a-4a, 22a.

Petitioners appealed and requested a stay pending appeal. The district court denied the stay request, explaining that petitioners had failed to establish a likelihood of success on appeal. Pet. App. 23a-29a.

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[2] Pursuant to 12 U.S.C. 3907(b)(2)(ii), a capital directive "issued pursuant to this paragraph, including plans submitted pursuant thereto, shall be enforceable under the provisions of [12 U.S.C. 1818(i)] to the same extent as an effective and outstanding [cease and desist] order issued pursuant to [12 U.S.C. 1818(b)] which has become final." Section 1818(i)(1) authorizes the FDIC to apply to the district court for enforcement of "any effective and outstanding notice or order" and states that the district court has jurisdiction to require compliance with those orders, but that, "except as otherwise provided in this section no court shall have jurisdiction * * * to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. 1818(i)(1).

The court rejected petitioners' contention that the issuance of the court's order ex parte violated the judicial review provisions of the Administrative Procedure Act (APA). The court found that "the determination of whether or not to issue a capital directive is committed to the sole discretion of the FDIC and is, therefore, unreviewable under the [APA]." Pet. App. 26a, citing 5 U.S.C. 701(a)(2). The court also rejected petitioners' claim that the issuance of the capital directive without a hearing violated the Due Process Clause of the Fifth Amendment. Pet. App. 27a-28a. Finally, the court dismissed the contentions that the ex parte order was the result of misrepresentations by the FDIC about the nature of the district court's role in enforcing a capital directive, and that the FDIC's procedures violated the APA.[3] *Id.* at 26a.

3. The court of appeals affirmed. The court agreed with the district court that judicial review of the capital directive was not available because the issuance of a capital directive is "committed to agency discretion by law" under 5 U.S.C. 701(a)(2). Pet. App. 11a, 14a. The court noted that Section 701(a)(2) precludes APA review of agency actions under statutes "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Pet. App. 10a, quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). The court also noted that in *Webster* v. *Doe*, 486 U.S. 592 (1988), this Court had found the absence of meaningful standards for review where the statute permitted the Director of the Central Intelligence Agency (CIA) to terminate an employee whenever

[3] The court of appeals also denied petitioners' request for a stay. Pet. App. 4a.

the Director "shall *deem* such termination necessary or advisable in the interests of the United States." 50 U.S.C. 403(c) (emphasis added). The court found in ILSA a parallel to the language in *Webster*; ILSA's repeated use of the terms "deem" and "discretion," in defining the FDIC's power to regulate minimum capital requirements, leaves the courts without meaningful reviewing criteria. The court also found support for that result in the legislative history of ILSA. Pet. App. 12a-14a.

Next, the court rejected petitioners' claim that the FDIC's procedures for issuing a capital directive violate the Due Process Clause of the Fifth Amendment.[4] The court first described the FDIC's procedures. Under the FDIC's regulations, the agency is required to notify the bank of the agency's intent to issue a capital directive and to provide the underlying data from which the bank's capital was calculated. The regulations further provide the bank with an opportunity to file a written response, with supporting data, to explain why the directive should not issue or should be modified. Finally, the FDIC is required to consider the bank's response and to make findings of fact and conclusions of law. Pet. App. 16a.

The Bank did not argue that the FDIC had failed to observe these procedures, but complained that the procedures do not afford an adequate chance to challenge the facts supporting the determination of a capital deficiency. The court dismissed that contention, noting that the regulations give a bank the right to

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[4] Although it had found that judicial review of the agency's determination to issue a capital directive was precluded, the court determined that Congress had not manifested an intention to preclude review of constitutional claims. Pet. App. 14a.

submit any relevant evidence bearing on the underlying facts. Pet. App. 17a; 12 C.F.R. 325.6(c). Petitioners "did not take full advantage of [the Bank's] opportunity to respond," nor did petitioners "challenge any of the data provided [the Bank], including the report of examination." Pet. App. 17a. "Needless to say, [the Bank's] failure to take such opportunity is not due to an inherent deficiency in the procedures." *Ibid.*

Turning to the issue whether due process required an evidentiary hearing, the court applied the three-factor analysis of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The court found that although the private interest affected is "substantial," the risk of an erroneous deprivation of that interest under the FDIC's procedures is "minimal" because "[t]he decision to issue [a directive] comes only after several deliberative steps and thorough documentation, including a bank examination, presentation of the examination report to a bank and consideration of any written response." Pet. App. 18a. The court also found that the government interest in prompt implementation of the capital directive is significant because of the harm that delay could cause to the Bank's financial condition. *Ibid.* Weighing those interests, the court concluded that petitioners' due process rights are adequately protected by the existing procedures. *Id.* at 19a.

ARGUMENT

The court of appeals correctly decided the two issues before it—whether a capital directive issued by the FDIC is subject to judicial review and whether the FDIC's procedures for issuance of such a directive violate due process. No other court of appeals has addressed either issue, and the court's decision does not conflict with any decision of this Court. Moreover, petitioners' procedural challenges are entirely academic because petitioners have never questioned the substantive underpinnings of the FDIC's decision to issue the capital directive, *i.e.*, the agency's determination that petitioners failed to meet the minimum regulatory capital requirements. Accordingly, this Court's review is not warranted.

1. Petitioners contend (Pet. 8-12) that the court of appeals erred in holding that the issuance of the capital directive is "agency action committed to agency discretion by law," and therefore unreviewable under 5 U.S.C. 701(a)(2). The court of appeals, however, correctly concluded that the statute provides no meaningful standards against which to review the complex and technical financial determinaitons that the FDIC makes under ILSA; accordingly, the APA does not afford a right to judicial review.

a. ILSA repeatedly uses terms of judgment reflecting Congress's intent to give the banking agencies broad discretion. Minimum capital levels are to be established as the agency, "in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution"; the banking agency "may * * * deem[]" noncompliance to be an unsafe or unsound practice, "in its discretion"; and the agency "may issue" a capital directive "[i]n addition to, or in lieu of, any other action au-

thorized by law." 12 U.S.C. 3907(a)(2), (b)(1), and (b)(2)(A). Neither the statute nor the implementing regulations provide any standards that courts could apply in considering whether the agency acted within the boundaries of its discretion in issuing a capital directive. As in *Webster* v. *Doe*, the statute "fairly exudes deference * * * and appears * * * to foreclose application of any meaningful standard of judicial review." 486 U.S. at 600.[5]

The legislative history confirms that conclusion. As the court of appeals noted, Pet. App. 6a-7a, a specific purpose behind Congress's enactment of ILSA was to overrule *First Nat'l Bank of Bellaire* v. *Comptroller of the Currency*, 697 F.2d 674, 685-687 (5th Cir. 1983), which had set aside, as unsupported by substantial evidence, a banking agency's requirement of a capital ratio in a cease and desist order. The Senate Report criticized *Bellaire* because it had "clouded the authority of the bank regulatory agencies to exercise their *independent discretion* in establishing and requiring the maintenance of appropriate levels of capital." S. Rep. No. 122, 98th Cong., 1st Sess. 16 (1983) (emphasis added). In seeking to forestall such judicial intervention, the Senate Banking Committee explained that

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[5] The discretionary nature of a capital directive is also evident from the overall statutory scheme. A capital directive generally would follow a painstaking examination of the bank's books and discussions with bank officials. The purpose of the directive is to have the bank shore up its capital position in order to keep it from experiencing more serious financial troubles. If more serious troubles develop, however, there are far more serious remedies—such as the appointment of a conservator or receiver for the bank. In those settings, judicial review of the agency's action is available. See *Franklin Sav. Bank* v. *Director, Office of Thrift Supervision*, 934 F.2d 1127, 1141-1142 (10th Cir. 1991).

> establishing adequate levels of capital is properly left to the expertise and discretion of the agencies. Therefore, in order to clarify the authority of the banking agencies to establish adequate levels of capital requirements, to require the maintenance of those levels, and *to prevent the courts from disturbing such capital*, the Committee has provided a specific grant of authority to the banking agencies to establish levels of capital.

Ibid. (emphasis added). Against that background, it is clear that the issuance of a capital directive, which results from technical banking determinations implicating industry expertise as well as economic judgment, is not subject to judicial review.[6]

b. Petitioners contend (Pet. 8-12) that Section 701(a)(2) cannot preclude review because a capital directive is enforced by the courts at the behest of an executive agency. No decision of this Court, however, holds that the nonreviewability of an agency determination turns on whether a private party or the government has invoked the jurisdiction of the courts. If that were true, the reviewability of agency

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[6] Petitioners err in relying (Pet. 11) on a statement by Banking Committee Chairman St. Germain that "[t]he committee believes that the authority of an agency to require a bank to maintain adequate capital is properly within the expertise and discretion of the agency, subject to the appropriate standard of judicial review." 129 Cong. Rec. 22,652 (1983). Even if read as implying that courts may review capital directives—something the statement does not say—the statement cannot take precedence over the clear statutory language and structure of ILSA. See *Wisconsin Public Intervenor* v. *Mortier*, 111 S. Ct. 2476, 2484 n.4 (1991). Moreover, the floor statement is entitled to considerably less weight than the authoritative explanation in the committee report. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 76 (1984).

action would depend on fortuities of litigation, rather than the nature of the pertinent statutory provisions. For example, in *Webster* v. *Doe*, *supra*, the Court found that a CIA employee could not obtain judicial review of his termination. Under petitioners' approach, however, if the CIA had sued Doe to require him to surrender his agency credentials on the ground that he had been terminated, Section 701(a)(2) would not have applied and Doe would have been entitled to full-scale judicial review on the merits of his termination. By the same reasoning, if a bank filed a complaint seeking APA review of the FDIC's issuance of a capital directive, petitioners would not object to the FDIC's reliance on Section 701(a)(2). Nothing in the APA remotely suggests that the reviewability of a particular agency determination hinges on which party is the plaintiff. Section 701(a)(2) speaks in terms of "statutes" that preclude review, not "actions" in which review is precluded.[7]

Petitioners also briefly contend (Pet. 7-8, 15) that the court of appeals misconstrued both 5 U.S.C. 701(a)(1), which provides that review under the APA is unavailable where "statutes preclude judicial review," and the jurisdictional limitations of 12 U.S.C. 1818(i). No question respecting either provision is presented in this case; the court of appeals did not rely on either in holding that review is precluded. The court of appeals considered the applicability of

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[7] Petitioners' reliance (Pet. 9-10) on *Heckler* v. *Chaney*, *supra*, is misplaced. In that case, the Court established a presumption that an agency decision *not* to bring an enforcement action is nonreviewable. 470 U.S. at 832. The Court did not consider what standards govern decisions to initiate a proceeding, nor did it address the reviewability of an administrative determination that is enforced through the courts.

Section 701(a)(1), but held that "even if review is not prohibited pursuant to § 701(a)(1), it is precluded pursuant to § 701(a)(2), because issuance of a directive is committed to the FDIC's discretion." Pet. App. 14a. As to Section 1818(i), the court did no more than note that "no review is allowed in the district court enforcement proceeding" because the court's "jurisdiction is limited to the 'power to order and require compliance.'" Pet. App. 10a, quoting Section 1818(i). While that statement is supportive of the position we urge—that review is not available of a capital directive—the court's opinion makes clear that it rested its decision, not on Section 1818(i), but on Section 701(a)(2) of the APA.[8]

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[8] Although construction of Section 1818(i) was not necessary to a rejection of petitioners' claims, we note that petitioners are wrong in suggesting (Pet. 8) that our brief in *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, No. 90-913, concedes that Section 1818(i) is not a jurisdictional bar. As we explained in our reply brief in *MCorp* (at 2 n.1), Section 1818(i) *is* a jurisdictional limitation, which, as applied to cease and desist orders, effectively calls for the exhaustion of administrative remedies. As applied to capital directives by ILSA, however, Section 1818(i) functions as a complete jurisdictional bar to judicial review. Petitioners also assert (Pet. 15-16) that the court of appeals' decision essentially renders the *MCorp* case "moot" because banking agencies can accomplish the same purpose, *i.e.*, requiring an increase in the bank's capital, without providing the same procedures that apply when the Federal Reserve Board requires a bank holding company to supply capital to a subsidiary bank. The short and complete answer is that capital directives may issue only against "banking institutions," 12 U.S.C. 3907(a), not bank holding companies. Therefore, a capital directive cannot impose requirements on a bank holding company such as were imposed in *MCorp*. More importantly, petitioner overlooks that a capital directive is a comparatively mild requirement compared to the more stringent

2. Citing *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), petitioners claim (Pet. 12-13) that the procedures employed in this case violate Article III and the Due Process Clause because the courts below enforced a capital directive without having reviewed it. Contrary to petitioners' contention (Pet. 12-13), the nonreviewability of a capital directive is not unconstitutional. As this Court recognized in *Thomas*, "[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." 473 U.S. at 583. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439 (1988) (no review of the amount of backpay due an employee of the federal government); *NLRB* v. *United Food & Commercial Workers*, 484 U.S. 112 (1987) (no review of General Counsel's settlement of an unfair labor practice complaint); *Wayte* v. *United States*, 470 U.S. 598, 607 (1985) (decision whether or not to prosecute rests within the discretion of the prosecutor and "is particularly ill-suited to judicial review"); *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982) (no review of the amount of payment due under Part B of the Medicare program); *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943) (no review of National Mediation Board decisions). Under those cases, there is no irreducible constitutional requirement that Article III courts review all determinations in a federal regulatory program.

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remedies in the banking regulators' arsenal, see 12 U.S.C. 1818. Indeed, capital directives are relatively rarely used. The paucity of litigation regarding capital directives, as well as the absence of any other circuit court decisions on the issue, undercuts petitioners' submission (Pet. 16-17) that the issue in this case are of widespread importance.

The Article III and due process claims in this case are particularly weak because judicial review was available for petitioners' constitutional claims. Cf. *Webster* v. *Doe*, 486 U.S. at 603. As the opinion of the court of appeals illustrates, a bank that receives a capital directive may raise due process or other constitutional claims in the context of an enforcement proceeding. Pet. App. 14a. It may also be that a bank could argue that a particular capital directive was wholly beyond the statutory authority of the agency to issue, cf. *Heckler* v. *Chaney*, 470 U.S. at 832; *Thomas*, 473 U.S. at 591-592, although petitioners never raised such a claim in this case. See Pet. 17 n.9. It is plain, in any event, that the Constitution does not require review of the factual or enforcement determinations that prompted the FDIC to issue the capital directive in this case.[9]

Petitioners also contend (Pet. 13-14) that the district court's enforcement of the capital directive violated either the Federal Rules of Civil Procedure or the Due Process Clause because of the failure of the court to give notice of the proceedings prior to entering its order. "The Federal Rules of Civil Pro-

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[9] Petitioners are not aided by *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987). As the passage quoted by petitioners indicates (Pet. 12), that case found a requirement of judicial review only where a criminal sanction was imposed as a result of an administrative determination, which is not the case here. Nor can petitioner derive support (Pet. 13) from *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 455 n.13 (1977), or *Touby* v. *United States*, 111 S. Ct. 1752 (1991). *Atlas Roofing* decided a Seventh Amendment issue and did not determine the requirements of Article III or of due process. *Touby* considered whether pre-enforcement judicial review of a particular agency action was required to survive a nondelegation challenge. No nondelegation challenge is presented here.

cedure were designed for ordinary, plenary civil actions. They do not apply to a summary proceeding that is not a 'suit of a civil nature' within the meaning of Rule 1." 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1026, at 102 (2d ed. 1987). Ex parte applications may be permitted in summary proceedings. *Id.* at 103. Because this case arose under 12 U.S.C. 1818(i)(1), which authorizes the FDIC to "apply * * * for the enforcement of any effective and outstanding order" and bars review of the merits, the district court properly treated it as a summary proceeding.[10] But whether or not this is so, petitioners suffered no prejudice as a result of proceedings in the district court, and thus are in no position to complain about them. See Fed. R. Civ. P. 61 (court must "disregard any error or defect in the proceedings which does not affect the substantial rights of the parties").

Petitioners had the opportunity to ask the district court to reconsider its order before compliance was required, and in fact they made all of their arguments to the district court about why an order should not issue in requesting a stay.[11] Pet. App. 23a-29a.

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[10] Under ILSA and 12 U.S.C. 1818(i), the district court, when enforcing a capital directive, is required to treat the capital directive as a final and unreviewable order; therefore, the only issue before the court is whether there has been compliance with the order. The district court's procedure here suited those requirements: the court issued an order enforcing the capital directive, subject to a showing by petitioners, in thirty days, that they had complied. Pet. App. 22a.

[11] In contrast to the situation in *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), see Pet. 13, the district court's ex parte order enforcing the capital directive did not enhance the burden on petitioners to establish a defense; it merely functioned as a "show cause" order that afforded petitioners the only right

They also had the benefit of raising and litigating all of their claims on appeal, subject to a de novo standard of review. And petitioners have never contested the FDIC's determination that there was a factual and legal predicate for issuing a capital directive against the Bank. *Id.* at 28a. In light of those factors, it is difficult to imagine what benefit petitioners would have derived from the procedures they claim to desire. The mode by which the district court proceeded had no adverse impact no petitioners' substantial rights.[12]

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to which they were entitled: the opportunity to demonstrate compliance.

[12] The petition presents two other questions that do not warrant review. The first question presented in the petition, Pet. (i), is whether, under the Constitution, ILSA, or the APA, a capital directive can be imposed without the opportunity for a hearing. The petition does not discuss that issue; accordingly, petitioners have shown no reason for this Court to review it. In any event, the court of appeals explained why the procedures afforded in this case satisfy the Due Process Clause, Pet. App. 14a-19a, see also *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979), and petitioners, having failed to request additional agency procedures, are barred from raising such a due process claim in this case. See *FDIC* v. *Mallen*, 486 U.S. 230, 247-248 (1988). Nor do ILSA or the APA require more formal procedures; ILSA is silent on the issue, and the issuance of a capital directive is not an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). The fourth question presented, Pet. (i), is whether a bank's directors can be ordered to comply with a capital directive issued to the bank. Again, the petition does not discuss that issue, but the court of appeals correctly resolved it. The directive was sent to the Bank's board, Pet. App. 2a n.2, which has the responsibility for directing the affairs of the Bank. *Id.* at 8a n.5. As the court of appeals noted, "[t]he Board was clearly on notice of the directive," *ibid.*, and its directors were properly held responsible for enforcing it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-24

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BANK OF COUSHATTA, *et al.*,
Petitioners,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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No. 91-24

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---

REPLY BRIEF TO BRIEF FOR THE RESPONDENT IN OPPOSITION

ARGUMENT

1. The Brief for the Respondent in Opposition ("Resp. Br.") abandons arguments made to the court of appeals or makes new arguments inconsistent with the basis upon which the court of appeals decided the case.

a. The Government for the first time argues that the district court's *ex parte* order was only a show cause order. Resp. Br. at 15-16, n. 11. But the FDIC said in its brief below that the court of appeals "ha[d] jurisdiction of this case pursuant to 28 U.S.C. § 1291 because the appellant . . . filed a timely appeal from a final judgment of the district court." Brief for FDIC at 12, *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991)

(No. 90-4577). The Government's new position also directly contradicts the FDIC's position, adopted by the district court, that the proceeding in district court was purely ministerial. *See* Pet. App. 26a.

Nothing in the district court's *ex parte* order (Pet. App. 21a-22a) or its ruling denying a stay pending appeal (Pet. App. 23a-29a) indicates that the district court considered its order anything less than a final and appealable order. Moreover, in view of the seriousness with which the FDIC litigates deadlines for appeal,[1] the petitioners had no choice but to appeal. The FDIC did not raise the issue of finality in opposing a stay in the district court, in opposing a stay in the court of appeals, or in its brief on the merits in the court of appeals. Nor did the court of appeals address the issue. Moreover, the Government does not list this issue of finality as a Question Presented. Resp. Br. I. Thus, at this stage the *ex parte* order must be considered final and appealable.[2]

b. Again changing positions, the Government argues in the space of one paragraph that the word "apply" in

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[1] *E.g., Amberg v. FDIC*, 934 F.2d 681 (5th Cir. 1991); *Kronholm v. FDIC*, 915 F.2d 1171 (8th Cir. 1990).

[2] If the Government's new characterization of the district court's order is accepted, the Government will no doubt argue that this Court should vacate the judgment of the court of appeals and remand the cause to that court with instructions to dismiss the appeal. *E.g., Di Bella v. United States*, 369 U.S. 121 (1962). Such a remand, however, should include instructions to the district court to conduct any further proceedings in accordance with the Federal Rules of Civil Procedure. See part 1.b. of this brief.

Such instructions would also be consistent with the intent of Congress that the right to a trial, either before the agency or in court, be preserved. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 45-46 (1946) (analyzing section 10 of the original version of the Administrative Procedure Act); *see also* 5 U.S.C. § 554(a)(1); *United States v. First City National Bank of Houston*, 386 U.S. 361, 368 (1967). Any instructions upon remand should also require consideration of this Court's recent decision in *Touby v. United States*, 111 S. Ct. 1752 (1991).

12 U.S.C. § 1818(i) makes the Federal Rules of Civil Procedure inapplicable to this case and that Rule 61 of those same rules makes the failure to comply with them insignificant. Neither argument was made below. The Government fails to acknowledge that the word "apply" in 12 U.S.C. § 1818(c)(2) and (f) is not generally believed to exempt the FDIC's adversaries from compliance with the Federal Rules of Civil Procedure when they "apply" for relief. *E.g.*, [*Anonymous*] *v. FDIC*, 617 F. Supp. 509 (D.D.C. 1985), *after remand*, 619 F. Supp. 866 (D.D.C. 1985) (application for stay initiated by the filing of a civil action). Moreover, although the statute in *United States v. Powell*, 379 U.S. 48 (1964), also used the word "apply" in authorizing the Internal Revenue Service to seek judicial enforcement of subpoenas, this Court held that because the statute contained no procedure to be followed in invoking the district court's jurisdiction the Federal Rules of Civil Procedure applied. 379 U.S. at 58 n.18. This Court also noted in *Powell* that the power of the IRS to enforce a subpoena "does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." *Id.* at 58; *see also New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

c. In the court of appeals the FDIC argued that the capital directive was unreviewable because there was nothing upon which a trial court could exercise its fact-finding powers:

> All that is even arguably left for review is the *arithmetic* by which the agency establishes the current level [of capital] . . . .

Brief for FDIC at 23, *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991) (No. 90-4577) (emphasis added). Now, in another complete about face, the Government bases its argument on "the complex and technical financial determinations the FDIC makes under ILSA" (Resp. Br. at 8), the "painstaking examination of the

bank's books and discussions with bank officials" (*id.* at 9, n. 5), and the "technical banking determinations implicating industry expertise as well as economic judgment" (*id.* at 10). The materials filed by the FDIC with the district court do not include any "complex financial determinations," any report of examination, or any information about the "discussions with bank officials." Thus, the Government has taken it upon itself to determine what facts are before the courts, apparently free to change its characterization of those facts to suit its changes in legal arguments. No matter how strong the Government's assertions as to the facts, they are only its assertions. The district court made no factual findings. *See* Pet. App. 21a-22a. The court of appeals' discussion was based upon the FDIC's pleadings in the district court, to which the petitioners had no opportunity to respond.

d. The Government now goes beyond the court of appeals in relying upon the withdrawal provision 12 U.S.C. § 1818(i). Although acknowledging that the court of appeals did not rest its analysis upon the withdrawal provision, the Government now flatly states, "Section 1818(i) functions as a complete jurisdictional bar to judicial review" of capital directives. Resp. Br. at 12, n.8. Although this statement is immediately contradicted by the statement that "a bank that receives a capital directive may raise due process or other constitutional claims in the context of an enforcement proceeding" (Resp. Br. at 14), the Government later says that "the district court, when enforcing a capital directive, is required to treat the capital directive as final and unreviewable order." *Id.* at 15, n. 10. The foregoing statements illustrate the need for this Court to grant certiorari and determine the role of district courts in the enforcement of capital directives.

e. The Government has also changed its position on the jurisdiction of Article III courts to review administrative orders in judicial enforcement proceedings. In his brief in *Touby v. United States*, 111 S. Ct. 1752 (1991) (No.

90-6282), at 35 n. 32, the Solicitor General noted that reviewability does not depend upon a specific statutory provision but is generally available in the defense of enforcement proceedings:

> The APA also incorporates that general rule, providing that "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement," 5 U.S.C. 703. That provision simply "restates existing law." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 99 (1947). See also *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 115 (1941).

Indeed, we are aware of no case prior to this in which the Solicitor General has argued that an Executive Branch agency can invoke the jurisdiction of an Article III court to enforce agency action without submitting the action to review. Thus, the Government's argument in this case would, if accepted, result in a novel constitutional doctrine.

2. The Government's argument that capital directives are rarely used (Resp. Br. at 13, n. 8) is no longer true. *See Carteret Savings Bank v. Office of Thrift Supervision*, 762 F. Supp. 1159 (D. N.J. 1991), *appeal docketed*, No. 91-5290 (3d Cir. filed March 25, 1991); *Transohio Savings Bank v. Director, Office of Thrift Supervision, appeal docketed*, No. 91-5246 (D.C. Cir. August 8, 1991).

It is particularly noteworthy that although the Solicitor General is on the briefs in the *Carteret* case, and although the Solicitor General has indicated that he will personally make the Government's argument in the Third Circuit in that case, neither of his briefs in *Carteret* (the most recent of which was filed on August 5, 1991) disputes the reviewability of capital directives. This underscores our point that the notion that an administrative agency can

impose an administrative sanction without judicial review is a novel proposition even within the Executive Branch. "If so obviously useful an instrument was available to the agencies, one would expect that [this Court] would previously have had occasion to review its exercise." *Brown v. Georgetown University Hospital*, 488 U.S. 204, 222 (1988) (Scalia, J., concurring) (rulemaking).[3]

3. The Government is wide of the mark when it attempts to avoid review of issues involving the right to a hearing under the Administrative Procedure Act and the question of the FDIC's authority over the individual petitioners. See Resp. Br. at 16 n.12. The Government does not dispute that the Questions Presented were before the court of appeals. Indeed, both of the cases the Government cites in support of its argument on these points were discussed by the Petitioners in their Reply Brief to the court of appeals.

The Government's argument that the APA hearing issue is not properly before this Court is simply wrong. It is true that the court of appeals, like the Government, did not cite *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), but it alluded to the issue. *See* Pet. App. 18a. Moreover, the issue is discussed in the Petition. *See* Pet. 7. It also seems apparent that the court of appeals believed that its decision on the issue of reviewability subsumed the APA hearing issue. *See Webster v. Doe*, 486 U.S. 592, 599 (1988) (5 U.S.C. § 701(a) limits application of the entire APA). Finally, the court of appeals

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[3] Because there has to be a first time for everything, the fact that the FDIC apparently never before used its capital directive authority does not, by itself, show that the agency was arbitrary and capricious in this instance. However, it does beg some rational explanation why after nearly a decade, the FDIC chose Bank of Coushatta as its first target. And although it is true that the Bank did not argue that the FDIC had failed to follow its own procedures, it is also true that the petitioners have not yet had the benefit of discovery in this case and that they have not yet pleaded in the district court.

discussed the issue of the FDIC's authority over individuals, and so did the petitioners. *See* Pet. 8, 13-14, 8a-9a.

4. The Government's reliance upon the Senate committee report on ILSA rather than the House Banking Committee Chairman's explanation to his colleagues is also inconsistent with prior views of the Department of Justice itself. *See generally* U.S. Dep't of Justice Office of Legal Policy Report to the Attorney General, *Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation* 15 (1989):

> To begin with, a committee report is typically prepared by staff after the committee votes to report the bill out, and there is no formal approval by the committee. Even if the committee formally voted on the text of the report, the report would represent the committee members' intent in the same way that the enacted bill represented the intent of the entire legislature. Thus, under the agency approach, if one had to look to the intent of the committee rather than the statute to ascertain the intent of the legislature, perhaps one would have to look to the intent of the appropriate subcommittee rather than the committee report to ascertain the true intent of the committee.

See also Starr, *Observations About the Use of Legislative History*, 1987 Duke L. Rev. 371, 375.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND LOUISIANA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a bank and bankers are entitled to notice, an opportunity to be heard and judicial review before a capital directive issued by the Federal Deposit Insurance Corporation may be enforced by the courts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-24

BANK OF COUSHATTA, et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND LOUISIANA BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

The American Bankers Association and Louisiana Bankers Association hereby respectfully submit this brief as amici curiae in support of the Petitioners with the consent of the parties. The signed consents of each are filed together with this brief.

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States, having as members both national and state-chartered banks located in each of the fifty states and the District of Columbia. Member banks of the Association range from the

smallest of community banks through regional, super-regional and money center banks. Collectively, the membership holds approximately ninety-five percent of domestic assets of all American commercial banks.

The Louisiana Bankers Association is the principal state trade association of the commercial banking industry in Louisiana, representing most of the approximately 230 banks located there. Virtually all of the members of both associations are insured by the Respondent Federal Deposit Insurance Corporation.

This is a case of first impression in this Court involving application and interpretation of an eight year old statute, the International Lending Supervision Act, codified in relevant part at 12 U.S.C. section 3907. Under this statute, the FDIC is authorized to establish whatever minimum level of capital[1] it deems

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[1] "Capital" includes common stock, preferred stock, surplus, undivided profits, reserves, convertible debt, subordinated notes and debentures and several more esoteric items. *See* 12 C.F.R. § 325.2(h), (i) and (l) (1991). The minimum capital adequacy rule in effect at the time of issuance of the capital directive here was that banks must maintain a ratio of total capital to total assets of 6 percent or more (12 C.F.R. § 325.3(b) (1991)), but the FDIC may make exceptions to this requirement (*Id.* at § 325.3(d)). However, effective April 10, 1991, FDIC adopted changes to the capital adequacy rules that establish a two-part capital test. 56 Fed. Reg. 10160 (March 11, 1991). First, the total capital to total assets ratio (the leverage ratio) was lowered to four percent and a new capital measure, the risk-based capital ratio was set at eight percent. For most small community banks, this results in a lower amount of capital being required by the FDIC. Bank of Coushatta thus has an outstanding capital directive against it, issued because its capital level was "unsafe and unsound" by then-applicable standards. The directive remains in force even though there are new standards in effect and, to our knowledge, there has been no determination made

necessary or appropriate for banking institutions to maintain; it is authorized to determine that failure to maintain required capital is an "unsafe and unsound practice"; and it is authorized to issue a "directive" to a bank requiring it to submit and adhere to a plan designed to achieve the required capital. Such capital directives may be enforced in court.

Besides failure to maintain required capital, there exist a whole panoply of activities, the number of which is limited only by one's imagination, that could be thought or charged or found to be "unsafe and unsound practices" in the banking industry. For all other such cases, however, there is a carefully prescribed legislative scheme for determining the validity of the allegations by the relevant bank regulatory agency, set forth in 12 U.S.C. section 1818. This scheme requires a notice of charges, a hearing before a presumptively neutral administrative law judge, a decision, and the right to seek and receive review of that decision in a United States Court of Appeals. But in the case of alleged capital insufficiency, the FDIC claims to be exempt from such procedural safeguards, and the Fifth Circuit agrees.

Since federal bank regulatory agencies, like banks or, indeed, any organizations, are staffed by fallible human beings, it is inevitable that they can sometimes be wrong in what they do.[2] When regulators do err,

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whether the Bank's capital level—then or now—is "unsafe and unsound." But FDIC seeks to place such a capricious result beyond the scope of judicial review.

[2] As an example, a bank's capital level may be seriously affected by the actions of the government agency itself. Bank examiners may insist that certain loans be written off or written

persons aggrieved by their actions must have some meaningful forum for redress. This fundamental principle of freedom from arbitrary government action lies at the heart of the constitutional system of checks and balances, the First Amendment right to petition for redress of grievances, and the Fifth and Fourteenth Amendments. The Fifth Circuit decision for which review is sought here denies that opportunity, to the detriment of many more institutions and people than only the Petitioners here. If an unchecked government agency can run roughshod over the Bank of Coushatta here in the interests of expediency, then it can do likewise to any bank. We do not deny the right, duty, or even the desirability of FDIC supervision of the banking industry in the interests of preserving and protecting the insurance fund, the public, and the banks themselves. But that responsibility is not incompatible with the grant to affected banks and bankers of the opportunity to defend themselves. As

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down, or that loan loss reserves be increased. But the determination of when and to what extent a particular transaction becomes a "loss" is more often than not a subjective judgment about which reasonable minds may differ. In one recent case, examiners classified a $102 million loan as a complete loss, even though the lender has been collecting $900,000 per month in interest on the loan, the payments are current and the loan has been valued at more than fifty cents on the dollar in the secondary market. (Zuckerman & Atkinson, *Wells Chief Went to Washington To Appeal Harsh Loan Evaluation*, American Banker, July 18, 1991 at 1). If such a determination, alone or coupled with similar determinations, caused the capital of the bank to drop below the magic six percent, the bank could—by virtue of government action alone—be facing a capital directive, and under the Fifth Circuit decision would have no recourse, no opportunity, ever, to contest the arguably wrong loan classification.

representatives of the banking industry, your amici respectfully submit that it is in the interest of our respective members to preserve that opportunity.

SUMMARY OF THE ARGUMENT

This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976) sets forth a three-part test for determining when due process requires that a party be afforded an evidentiary hearing before the party may finally be deprived of some property or liberty interest. The Fifth Circuit decision for which review is here sought pays only lip service to this Court's directive. It found that one of the factors weighed in favor of a hearing for the Bank and its directors, but nevertheless ruled against such a hearing based upon the other two factors. The court perfunctorily assumed, contrary to the only evidence on point, that there was an overriding governmental interest in expediency (to which due process is anathema). But the most critical—and wrong—determination the court below made was to find that in *this* case there was a minimal risk of deprivation of the rights of the Bank and its directors and, *therefore*, capital directives will *always* be immune from judicial review. That rule is not what *Mathews v. Eldridge* requires, and it ought not be applied to the Petitioners.

REASONS FOR GRANTING THE WRIT

In this case, the Fifth Circuit has decided the due process claims raised by the Bank and its directors in a way that conflicts with the three-part test laid down by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In addition, the current litigation represents the first attempt to apply the *Mathews* test

specifically to the authority of federal regulatory agencies to issue capital directives. The case therefore raises an important question of federal law—one bound to recur frequently in the absence of review here—which has not been, but should be, settled by this Court.

The *Mathews v. Eldridge* Test

As indicated above, this Court has decreed that there are three factors which must be taken into account and weighed by the courts in order to determine when due process requires that some form of hearing be held before an individual may finally be deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. at 333-335.

The first of these is the private interest that will be affected by the official action. In this case, the Fifth Circuit found that "the private interest affected is obviously substantial". *FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1131 (5th Cir. 1991) (Pet. App. 18a). The Respondent apparently concedes that this is so. *Brief For the Respondent in Opposition* at 7. Nevertheless, since the *Mathews* test is a balancing one, it is important to emphasize here just how important that interest is rather than risk having it understated and omitted from serious consideration. The court below has held that the issuance of capital directives by the bank regulatory agencies is a matter within the unreviewable discretion of the agencies—meaning that the agency may or may not entertain a bank's protests against the issuance of such a directive as the agency itself sees fit. Moreover, upon application by the agency, a District Court is expected to "enforce" such a directive summarily and, indeed in this

case, *ex parte*. Since capital directives are unreviewable, there are no real grounds for an appeal to a U.S. Circuit Court of Appeals of such an *ex parte* order. But once that order has been duly issued by a court having subject matter and personal jurisdiction (not in issue here), it must be obeyed regardless of its validity. Disobedience of even an invalid order is punishable as criminal contempt. Court orders must be obeyed unless or until reversed or set aside in an orderly fashion. *Maness v. Meyers*, 419 U.S. 449, 459 (1975); *Walker v. City of Birmingham*, 388 U.S. 307,320-321 (1967); *U.S. v. United Mine Workers*, 330 U.S. 258, 293 (1947). Thus, in the event that the bank or the bankers in this case are eventually charged with contempt, the *only* question will be whether or not they complied with the court's order. Never having had the opportunity to challenge the validity of the capital directive in the first place, they will be denied the opportunity to challenge it at that point as well.

The third *Mathews* factor to be weighed is the government's interest. Here, in one short paragraph, the court below concludes that "the government's interest in having capital directives *promptly* implemented is significant". *FDIC v. Bank of Coushatta*, 930 F.2d at 1131 (Pet. App. 18a) (emphasis added). There having been no evidentiary hearings in this case, and no findings of fact, that conclusion is obviously based upon nothing except the arguments of the FDIC's lawyers—arguments which are belied by FDIC's actual dalliance in this case. FDIC issued the capital directive in this case on September 22, 1989, addressing the bank's condition as of April 28, 1989. (Pet. App. 31a-33a). *Nine months later*, on May 25,

1990, the FDIC's regional counsel wrote a letter to the District Court seeking judicial enforcement, without notice to the bank. Almost two months after that, the District Court entered its *ex parte* order (Pet. App. 21a). The Respondent seemed entirely content to allow fifteen months to elapse before it got around to addressing the bank's April 1989 condition. Such a real delay is wildly inconsistent with the allegations relied upon by the Fifth Circuit to the effect that even a few moments taken to supply notice to the bank of intended judicial action, even a short hearing, would delay the directive and allow a bank's financially troubled status to deteriorate further.[3]

It is, however, the second *Mathews* factor that is most critical here: "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335. Here, the Fifth Circuit mixes the constitutional and Administrative Procedure Act issues raised by the bank, perhaps necessarily so. It concludes that the Constitution does not require a hearing because FDIC pro-

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[3] There is another curiosity in this respect as well. In the Fifth Circuit, in order to satisfy the third *Mathews* factor, FDIC prevailed upon the court to conclude that the capital directive is an important tool for use by the banking regulatory agencies in addressing troubled banks—so important that its use should not be impeded by the procedural safeguards elsewhere applicable. But the Respondent has changed its tune now that this case is in a different forum. In the absence of a conflict among the Circuits, this Court generally limits its grants of certiorari to those cases raising "an *important* question of federal law." S.Ct. Rule 10(c) (emphasis added). The Respondent now belittles the importance of capital directives, claiming that they "are relatively rarely used." (*Brief in Opp.* at 13, n. 8)

cedures "satisfy Fifth Amendment due process." 930 F.2d at 1132 (Pet. App. 19a). But that is entirely an abstract holding, based solely upon the mere existence of "procedures" on paper. One can never know if these procedures satisfy due process when, in the same breath, the court holds (a) that FDIC's actions are committed to agency discretion by law (*Id.* at n. 8) and (b) not subject to judicial review because a court would have no meaningful standard against which to judge the agency's exercise of discretion". 930 F.2d at 1128 (Pet. App. 11a, quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In point of fact, there are "standards" against which to judge the agency's actions. While they are "standards" set by the agency itself, they are standards nonetheless. Indeed, the Fifth Circuit talks at length about what is "required" of the FDIC by its own rules. *See, e.g.*, 930 F.2d at 1130-1131 (Pet. App. 16a-17a)). FDIC is "required", for example, to "consider" the bank's response to a Notice of Intent to Issue a Capital Directive. That is a "standard" against which the agency's subsequent action could be measured. The word "consider" is a readily understood, simple English word with which courts are familiar. It means to reflect upon, think about with a degree of care, to regard or treat in an attentive, solicitous or kindly way. *Ratner v. Stark County Board of Revision*, 35 Ohio St. 3d 36, 517 N.E.2d 915, 917 (1988). It does not mean the same thing as simply to read. *Bowing v. Board of Trustees of Green River Community College*, 85 Wash. 2d 300, 534 P.2d 1365, 1372 (1975). But in this case we do not and cannot know whether and to what extent FDIC "considered" the bank's response, because the courts below have held that its "consideration, if any, is not subject to judicial re-

view. The Fifth Circuit goes on to say that an FDIC decision comes only after an *extensive* examination by a *trained* bank examiner. 930 F.2d at 1131 (Pet. App. at 17a). We do not and cannot know how extensive was the examination here or how well trained was the bank examiner in question, since those matters are not subject to judicial review. And yet, if those are indeed "requirements" which satisfy due process, they are likewise the kind of "standards" by which agency action may be judged.

It is no answer to say, as the court below does in this case, that "[t]he Bank does not contend that the FDIC did not follow its procedures". *Id.* Without any opportunity for any sort of a hearing, administrative or judicial, the bank is in no position even to ask whether procedures were followed or not, and if it cannot know or learn the answer to that question, it obviously would have no basis for a contention that procedures were not followed.

It is likewise no answer to claim that the FDIC reached the right result in this case (*See, e.g. Brief in Opp.* at 16). Of necessity, the amici must leave it to the Petitioners to discuss the merits of their own case. We hasten to point out, however, that to the extent the Fifth Circuit holds that the issuance of capital directives is not subject to judicial review under the Administrative Procedure Act, it is a precedent which must apply across the board—even when the FDIC gets it wrong. That makes this case one of far more importance than FDIC represents it to be—one warranting review by this Court. If the FDIC is so confident of its rectitude in this case or its capacity to reach correct results in all cases, then it should not be ashamed or afraid to defend its actions

before a neutral magistrate. Yet it has expended great efforts here to avoid precisely that result.

The decision of the Fifth Circuit creates a strange and intolerable impasse. "Due process" is satisfied in this case because and only because "procedures" exist, and therefore there is no constitutional problem with what FDIC has done here. At the same time, no one is entitled to raise any questions about those procedures because they involve matters committed to agency discretion and not subject to judicial review. Those two conclusions cannot logically co-exist.

CONCLUSION

For all of the reasons set forth herein, the American Bankers Association and Louisiana Bankers Association hereby respectfully urge the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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